

89-1577 (1)

Supreme Court, U.S.
FILED
APR 9 1990
JOSEPH F. SPANIOL, JR.
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No.

IN THE
Supreme Court Of The United States

October Term, 1989

JAMES L. HOOPER,

Petitioner,

v.

JOHN GILL, Jr., et al.,

Respondents.

**PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF APPEALS OF MARYLAND**

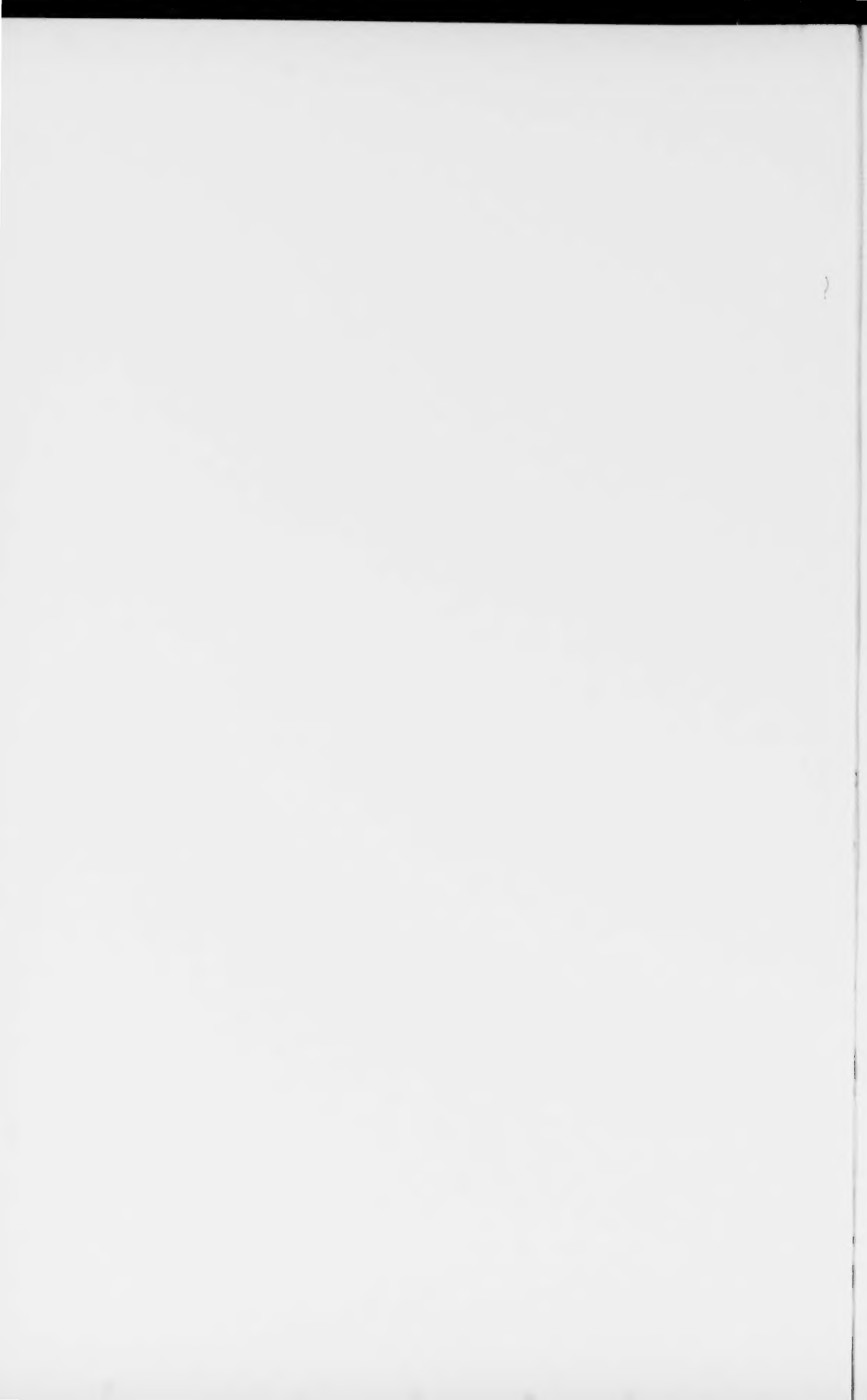
Allen H. Sachsels
3251 Old Lee Highway,
Suite 516
Fairfax, Virginia 22030
(703) 691-0130

Paul R. Wiesenfeld
932 Hungerford Drive
Suite 20
Rockville, Maryland 20850
(301) 762-5525

Wilbur H. Friedman, Jr.
(Counsel of Record)
1717 Pennsylvania Avenue, N.W.
Room 863
Washington, D.C. 20570
(202) 254-9329

Stephen A. Armstrong
10335 Democracy Lane
Fairfax, Virginia 22030
(703) 241-2855

916 Pp



QUESTIONS PRESENTED

1. Whether a state appellate court's refusal to remand petitioner's case for a trial on the merits to vindicate a cause of action which is clearly established by that state's law on the ground that the amount petitioner could recover "is absolutely *de minimis* in view of the costs in judicial time required for a retrial" deprived petitioner of property without due process of law, and the equal protection of the laws.

2. Whether the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States prohibit state courts from imposing insurmountable and unique procedural and evidentiary requirements on a civil action by a client against his criminal defense attorney who willfully and maliciously revealed confidential client information to the prosecutor in the criminal case because of a fee dispute with the client.

3. Whether the evidence adduced in this case was sufficient for a jury to find that a criminal defense attorney who willfully and maliciously revealed confidential client information to the prosecutor in that case conspired with the prosecutor to violate the criminal defendant's rights prescribed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

PARTIES

1. Petitioner is James L. Hooper, M.D., a physician practicing with Montgomery Medical Group, P.A., in Rockville, Maryland.

2. Respondents are John Gill, Jr., Thomas Sippel, and the law firm of Gill & Sippel, Rockville, Maryland.

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REFERENCE TO DECISIONS BELOW

The orders and judgment of the Circuit Court for Montgomery County, Maryland, Civil Action No. 16791 (A. 12-51) are unreported.¹ The decision of the Court of Special Appeals of Maryland (A.3) is reported at 79 Md. App. 437, 557 A. 2d 1349. The order of the Court of Appeals of Maryland denying a timely petition for a writ of certiorari (A.1) is reported at 317 Md. 510, 564 A.2d 1182. The Court of Appeals of Maryland did not enter a judgment other than its order. That court's order denying a timely motion for reconsideration (A.53) is unreported.

¹ "A." references are to the Appendix following this Petition.

JURISDICTION

The order of the Court of Appeals of Maryland denying a timely petition for a writ of certiorari was entered October 20, 1989 (A.1). Its order denying a timely motion for reconsideration was entered January 10, 1990 (A.53). Jurisdiction of this Court lies pursuant to 28 U.S.C. 1257 and 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 12-301 of the Courts and Judicial Proceedings Article of the Code of the State of Maryland provides, in pertinent part:

Except as provided in Section 12-302, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law.

Section 12-308 of the Courts and Judicial Proceedings Article of the Code of the State of Maryland provides:

Except as provided in Section 12-307, the Court of Special Appeals has exclusive initial appellate jurisdiction over any reviewable judgment, decree, order or other action of a circuit court, and an orphans' court.

STATEMENT

A. Summary

This is a civil action against John Gill, Jr., his co-partner, and their law firm, attorneys who represented petitioner as a defendant in a felony case in the Circuit Court for Montgomery County, Maryland. Petitioner had a fee dispute with Gill concerning the amount Gill was owed for the criminal defense representation. After petitioner refused to pay what Gill demanded, Gill revealed to the prosecutor in the criminal case confidential information acquired approximately 10 months earlier in the course of his representation in that criminal case. Gill admitted making the revelation to the prosecutor. He denied petitioner's allegation that the revelation was made because of the fees Gill claimed to be owed, and petitioner's testimony that he threatened petitioner the revelation would be made if petitioner failed to pay Gill the full sum Gill claimed. The Maryland Courts disposed of this case in favor of Gill without resolving the dispute concerning Gill's threat and his motivation. They concluded petitioner had not established a civil cause of action, or, alternatively, that the case was not worth the judicial resources to decide. The facts and rulings are detailed below.

B. Facts

In 1980, the State of Maryland began a prosecution of Dr. James L. Hooper for Medicaid Fraud. Conviction meant possible long imprisonment. He employed John Gill, Jr., and the law firm of Gill & Sippel as counsel in his defense in the late summer of that year. Dr. Hooper paid Gill & Sippel a retainer against which time was to be billed.

Gill and his firm were discharged by Dr. Hooper in early 1981. Gill claimed he was owed fees above the retainer. The bill was disputed by Dr. Hooper.

When Dr. Hooper did not pay the fees Gill claimed due, according to Dr. Hooper, Gill threatened that if the fees claimed were not paid, Gill would make trouble for Dr. Hooper by informing the prosecutor in the Medicaid Fraud case in which Gill had represented Dr. Hooper that a potential witness the prosecutor had interviewed was not fully candid or truthful in that interview. Thereafter, when Dr. Hooper did not pay, Gill informed the prosecutor that the person in

question had not been truthful or candid in her interview with the prosecutor.²

Gill admitted that he had no information as to the circumstances under which a statement was given, precisely what was said, or whether anything said was under oath. He also admitted that he obtained the information in the course of his representation of Dr. Hooper as a criminal defendant in that very matter, that he sat on the information for approximately 10 months, and did not make the revelation until after Dr. Hooper failed to pay the sums Gill claimed to be owed.³

Based on Gill's revelation, which occurred during an approximate 10 minute conversation in which the prosecutor, who, before accepting the information, satisfied himself that the information Gill wished to reveal did not come directly from Dr. Hooper, the prosecutor took the information from Gill. The prosecutor, because of his conversation with Gill, reinterviewed the person in question.

No information damaging to Dr. Hooper was unearthed during the reinterview. The person was not called as a witness at Dr. Hooper's criminal trial.

Dr. Hooper was acquitted of any criminal wrongdoing. The State's case was dismissed. It could not prove even a *prima facie* case.

² Gill and Sippel also instituted suit against Dr. Hooper for the fees. The firm obtained a \$5,400.00 judgment, which was settled for \$4,400.00 while the case was on appeal. The settlement required that Dr. Hooper give Gill and his firm a general release. At no time prior to obtaining the release was Dr. Hooper informed of Gill's revelation to the prosecutor. It is undisputed that Dr. Hooper had no way of knowing of Gill's conduct at the time the fee suit was pending, or at the time he gave the general release demanded by Gill. Gill's action was uncovered by Dr. Hooper during discovery in another law suit. When Gill claimed that the instant case was estopped by the fee suit judgment and that Dr. Hooper's claim had been released, we amended our complaint to allege fraud. The *res judicata* question was not directly resolved by the Maryland courts. However, they held that Gill's action would not have been a defense available to Dr. Hooper in the fee suit and that Dr. Hooper had no action for fraud since he was not damaged by giving the release.

³ The opinion of the Court of Special Appeals states that Gill admitted his action only through counsel (A.3). That is incorrect. Gill admitted making the revelation both in deposition and at trial.

C. Proceedings Below

In 1986, Dr. Hooper sued Gill, his law firm, and Sippel, a general partner in the firm, seeking compensatory and punitive damages. As ultimately amended, the complaint alleged contractual and tortious breaches of fiduciary duties, fraud, and violations of Fifth, Sixth, and Fourteenth Amendment rights.⁴

The trial court held that because Dr. Hooper was not convicted as a result of Gill's action there were no compensatory damages in this case. It rejected Dr. Hooper's contention that part of the fee he paid Gill was for a continuing obligation to preserve client confidences and secrets. Furthermore, it ruled that if Gill's conduct constituted a breach of fiduciary duty, that breach, because it occurred after Gill had been terminated as counsel, would not have been a defense to Gill's suit for fees and that Dr. Hooper could recover no part of the amount he paid Gill.⁵ The court held that Dr. Hooper could recover nominal damages of \$1.00 upon proof of Gill's breach of a fiduciary duty — either tort or contract.⁶

With respect to Dr. Hooper's claim that Gill had violated 42 U.S.C. 1983 by conspiring to violate Constitutional rights, the trial court held that because both Gill and the prosecutor testified they made no agreement Gill would convey the information, no conspiracy could be established. Accordingly, it granted summary judgment on that claim against Dr. Hooper.

At trial, the court ruled that expert testimony was required to establish as a matter of law that Gill's action was a breach of fiduciary

⁴ The suit, filed August 5, 1986, alleged contractual and tortious breaches of fiduciary duties by Gill. On August 28, 1986, an amended complaint was filed alleging Constitutional violations cognizable under 42 U.S.C. 1983 (A.56, 60). Other amendments added Gill & Sippel and Thomas Sippel as parties defendant.

⁵ See, p. 5 n. 2, *supra*.

⁶ In Maryland, a judgment for nominal damages will not support an award of punitive damages. Small compensatory damages, however, will support an award of punitive damages in an appropriate case. See, *Shell Oil Co. v. Parker*, 265 Md. 631, 636-646 (1972); *Montgomery Ward & Co. v. Keulemans*, 275 Md. 441, 446-447 (1975); *Heinz v. Murphy*, 180 Md. 423, 429 (1942). To recover punitive damages for a tort arising from a contract, "actual malice is a prerequisite." *H&R Block, Inc. v. Testerman*, 275 Md. 36, 47 (1974).

duty. It held that, as with a case for negligent legal malpractice, Dr. Hooper was required to prove the "standard of care" by expert testimony. The court excluded the testimony of Professor Abraham Dash of the University of Maryland School of Law that Gill's conduct violated the Code of Professional Responsibility. Dash stated he could not testify as an expert that Gill's conduct was a breach of fiduciary duty as a matter of law because it was the function of the court to make that determination. He said that Gill's action was a breach of the attorney/client contract, and that his opinion as a lawyer was that Gill's conduct breached a fiduciary duty.⁷

The Maryland Court of Special Appeals affirmed. It held that since Dr. Hooper was not convicted there were no damages. Except for the trial court's holding that expert testimony was required to prove the "standard of care" in this case (an issue the court did not reach), the holdings of the trial court were affirmed. Further, it stated:

There is, of course, the claim to be made that, even though actual damages were not shown, the doctor is nevertheless entitled to nominal damages as a result of the breach of confidence. We turn that contention aside because the amount recoverable, if actionable, is absolutely *de minimis* in view of the costs in judicial time of retrial on the sole issue of nominal damages.

The Court of Special Appeals assessed costs against Dr. Hooper. Costs for the appeal totalled nearly \$3,700.00 (A.54).

A timely petition for a writ of certiorari was denied by the Court of Appeals of Maryland (A.1). Thereafter, a timely motion for reconsideration (A.64), which argued, *inter alia*, that the Court of Special Appeals' refusal to resolve the issues and remand for a trial on the merits because only nominal damages were at stake violated Due

⁷ Professor Dash was called as a witness because Gill had asserted his conduct was required by DR 7-101(B)(2) of the ABA Code of Professional Responsibility, which provides:

A lawyer who receives information clearly establishing that: A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Gill also claimed his action was required under this Court's decision in *Nix v. Whiteside*, 475 U.S. 157 (1986).

Process, was denied by that court (A.53). The motion (A.64-74) specifically pointed out that not only was there an issue of nominal damages, but, in addition, Dr. Hooper had been denied substantial costs and was required to pay the costs of the defendants.

REASONS FOR GRANTING THE WRIT

1. "[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), citing *Mullone v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Martinez v. California*, 444 U.S. 277 (1980). "The hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Ibid* at 430. "[T]he types of interests protected as 'property' are varied, and as often as not, intangible." *Id.*

It is fundamental that Due Process requires access to the courts. As stated in *Hillard v. Scully*, 537 F. Supp. 1084, 1086 n. 5 (S.D.N.Y. 1982):

Effective access to the courts is a constitutional right, *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), which "encompasses all means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges against him or grievances alleged by him," *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15, 92 S. Ct. 250, 30 L. Ed. 2d 142 (1971).

It is settled law in Maryland that breach of contract, absent a showing of actual damages, entitles an aggrieved party to a judgment for nominal damages. *Mason v. Wrightson*, 205 Md. 481, 488-489 (1954); *Hooton v. Kenneth B. Murman Plumbing & Heating Co., Inc.*, 271 Md. 565, 572-573 (1984). Further, such damages are recoverable for deliberate torts even though actual damages are not proven. *See, Newton v. Spence*, 20 Md. App. 126, 137 (1974), *certiorari denied*, — Md. — (1974); *Tyler v. Cedar Island Club*, 144 Md. 214, 219 (1923); *McAllister v. Moore*, 247 Md. 528, 529-530 (1967); 14 M.L.E., "Libel and Slander", sec. 114 at 261; 21 M.L.E., "Trespass", sec. 13 at 147-148. The entitlement to nominal damages for breach

of contract and deliberate torts is so clear that Maryland Pattern Jury Instruction 10:5 states:

NOMINAL DAMAGES

a. Intentional Torts

A person who has been [assaulted] [falsely imprisoned] [maliciously prosecuted] [the victim of a trespass] [the victim of a conversion] but who has not suffered any actual injury may recover nominal damages of \$1.00.

b. Contracts

A party to a contract which has been broken may recover nominal damages of \$1.00 even though he fails to prove that he suffered actual damages.

As stated in *McCormick, Damages*, at 88 (1935), literally as black letter law (bold face in original):

In the later evolution of tort law through the action on the case, the rule developed that certain wrongs were not actionable at all unless actual loss or damage were shown, and this remains true of actions for negligent injury to person or property, and actions for deceit. In most other kinds of actions for torts, however, such as libel, nuisance, and malicious prosecution, proof of the wrongdoing entitles the plaintiff to nominal damages at least, regardless of the loss or damage.

In actions for breach of contract proof of damages is not essential; if the breach is proved and no damage shown, nominal damages will be given.

Accordingly, the trial court ruled that even if Dr. Hooper could not prove actual damage, he was entitled to try his case for nominal damages. While the appellate court did not disagree with that conclusion, it made a discretionary judgment that the case was not worth judicial time because the amount that could be recovered was small.

What was done was not an abuse of discretion. It was the exercise of discretion in circumstances in which there was no authority to exercise discretion. As stated above, the law is clear in Maryland that in the circumstances presented a plaintiff who cannot show actual

damage is entitled to recover nominal damages. The Maryland law also is clear that a party is entitled to an appeal of right from the Circuit Court to the Court of Special Appeals. An appellate court does not have discretion to refuse to decide a case because the amount involved is small in monetary terms. It has an absolute duty to hear and decide the appeal.⁸ See, Maryland Code, Courts and Judicial Proceedings Article, Sections 12-301 and 12-308.

There is no statutory authority for the courts to set jurisdictional amounts for the cases they will hear. Setting such limitations is a legislative, not a judicial, function.⁹ By statute, the Court of Special Appeals was obligated to decide this case. By settled law, Dr. Hooper, if he so elected, was entitled to try his case for nominal damages. See, *supra*, and *Carey v. Piphus*, 435 U.S. 247, 266 (1978). "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is or was afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682 (1930).

Not only was Dr. Hooper denied the right to a retrial "because the amount recoverable ... is absolutely *de minimis* in view of the costs in judicial time." 79 Md. App. at 445. For asserting a right, he was, in addition, required to pay costs in the appellate court of nearly \$3,700.00, including the costs (\$304.00) of Gill, *et al.* (A. 54). These amounts are not nominal.

2. Totally apart from the issue of Dr. Hooper's right to a determination of the issues, the Maryland Courts have failed and refused

⁸ Maryland courts have themselves recognized their obligations in this regard. See, *In re Trader*, 20 Md. App. 1, 7-8 (1974), *reversed on other grounds*, 272 Md. 364 (1974).

⁹ It is but one step from the Court of Special Appeals' reasoning to courts making arbitrary determinations that, despite statutory obligations, compensatory damages must be of a certain minimum amount before it is worth the judicial resources to resolve the issues. That is not our system of justice. "[C]ourts at all levels are available and receptive to claims, large and small, by any and every citizen of this country." *Rankin v. McPherson*, 483 U.S. 378, 392 (1987) (concurring opinion). It also is fundamental that the law is to be applied equally to like cases. The courts cannot properly select in which cases they will permit a party the opportunity to vindicate clearly established rights.

to apply their own decisions to this particular case. By so doing, they have endorsed policies that are at odds with Fifth, Sixth, and Fourteenth Amendment guarantees, and have created unique procedural and evidentiary requirements for this particular case, thereby denying both Due Process and Equal Protection.

The Maryland Courts have held, unequivocally, that a fiduciary who breaches his trust forfeits his right to compensation, regardless whether that breach of loyalty resulted in consequential damages. The amount of such forfeiture depends on when in the relationship the breach occurred and whether the compensation is divisible or indivisible. Where the compensation is indivisible the disloyal fiduciary is entitled to nothing. *See, Maryland Credit Corp. v. Hagerty*, 216 Md. 83, 90-93 (1958); *Bright v. Ganus*, 171 Md. 493, 501-505 (1937). *See also, Shipley v. Meadowbrook Club*, 211 Md. 142, 148 (1956); *Lawson v. Baltimore Paint & Chemical Corporation*, 347 F. Supp. 967, 977 (D. Md. 1972). *And see, Crawford v. Logan*, 656 S.W. 2d 360, 364 (Tenn. 1983); *Ross v. Scanwell*, 97 Wash. 2d 598, 609-610 (1982); *Rice v. Perl*, 320 N.W. 2d 407, 411 (Minn. 1982); *Terry v. Bender*, 143 Cal. App. 2d 198, 213 (1956); *Restatement (Second) Agency*, sec. 469, Comment e; *Restatement (Second) Trusts*, sec. 243.

The trial court's conclusion, undisturbed on appeal, that a willful and malicious breach of a fiduciary duty by an attorney does not preclude or diminish the attorney's compensation if that breach occurs after the active portion of the representation is contrary to settled Maryland law and the generally applicable law in the United States. The court simply refused to acknowledge that part of a fee paid to an attorney is for his continuing duty after the active representation has ended to preserve client confidences and secrets. *See, Shelton v. Gwathmy*, 107 N.Y.S. 2d 653, 655 (Sup. Ct. 1951); *Burk v. Burzynski*, 672 P.2d 419, 426 (Wyo. 1983); *In re Hansen*, 586 P.2d 413 (Utah 1978); *Kelly v. Weir*, 243 F.Supp. 588, 597 (E.D. Ark. 1965). Indeed, the same appellate court that refused to apply that principle itself has stated, "An attorney's obligation to respect the confidences and secrets of his client ... continues after termination of the lawyer's services and even survives the death of the attorney or the client." *Beckette v. State*, 31 Md. App. 85, 89 (1976).

In a criminal matter, the obligation of defense counsel to take no action to harm his client by going to the prosecutor in that case with what he believes is damaging information, acquired in the course of that representation, and relating to his client, goes to the very heart of Constitutional protections against self-incrimination and to Due Process and right to counsel guarantees. Here, it is undisputed that Gill went to the prosecutor with information acquired during his representation of Dr. Hooper. It also is undisputed that the breach of confidence occurred approximately 10 months after the information was acquired by Gill, and that the breach occurred only after Dr. Hooper disputed Gill's claimed fees. Especially when coupled with Dr. Hooper's testimony that Gill threatened the precise action he admittedly took if Dr. Hooper did not pay all Gill demanded, malice is an inescapable conclusion.

That the trial court concluded it needed expert testimony to determine whether Gill's action was a breach of fiduciary duty is puzzling, to say the least. Gill's action "smacks of the basest conflict of interest and disloyalty" and was "the utter perversion of the attorney-client relationship." *Messelt v. Alabama*, 595 F.2d 247, 251 (5th Cir. 1979) (defense counsel suggested to prosecutor that his client be charged with more serious offenses so defense counsel could charge a higher fee). See, Mallen and Smith, *Legal Malpractice* (3rd ed. 1989), sec. 11.1 at 631, stating:

The fiduciary obligations which are the premise of trust may be simply stated. The attorney is under a duty to represent the client with undivided loyalty, [and] to preserve the client's confidences...

Thus, "the confidential relationship between attorney and client is the soul of lawyering" and is "the cornerstone of the legal profession, without which the adversary system would not work." *Ex Parte Taylor Coal Co., Inc.*, 401 S.2d 1, 8 (Ala. 1981).

This Court has charged trial courts in criminal cases with the obligation to determine whether an attorney representing two defendants has a conflict of interest. See, *Glasser v. United States*, 315 U.S. 60, 70-71 (1942). There is no requirement expert testimony be elicited to make that determination involving often subtle distinctions. No

such subtlety was present here, and the court was fully competent and required to rule as a matter of law.¹⁰

The failure to find a civil cause of action because there were no damages — Dr. Hooper was not convicted as a result of Gill's action — opens the door to encouraging this kind of vindictive conduct that is utterly destructive of the attorney client relationship. According to the reasoning of the Maryland Courts, Dr. Hooper, even if he had been convicted, would have been required to show that but for particular evidence he would have been acquitted. The court would then be required to examine the record and determine (more accurately speculate) on what conclusion a jury would have reached *sans* the evidence in question.

What the court has done is made it virtually impossible for a criminal defendant whose counsel has conveyed information to the prosecutor to recover in a civil action. Such a ruling plainly does not further the policies underlying the Fifth, Sixth, and Fourteenth Amendments. It squarely conflicts.

Conversely, holding a willful and malicious breach of confidence by a defense attorney to be civilly actionable furthers those Constitutional policies. Obviously, the client did not get fully what he paid for — a continuing duty of an attorney after active representation ends to preserve client confidences and secrets. There plainly and clearly is damage to the attorney/client relationship and to the public interest. Just as there is an overriding Federal policy mandating, because of the First Amendment, limitations on libel actions (*See, New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), there are overriding Fifth, Sixth, and Fourteenth Amendment policies mandating that such egregious actions of criminal defense counsel be civilly compensable.

3. The grant of summary judgment on plaintiff's 42 U.S.C. 1983 claim also was error.

¹⁰ As stated, *supra*, p. 7 n. 7, Gill sought to justify his action based on the ABA Code of Professional Responsibility. That is the only reason Professor Dash was called to testify. Gill's attempted defense fails on its face. He did not act promptly, and he did not go to the tribunal. He went to the prosecutor. Furthermore, Gill admitted he had no information that clearly established anything. DR 7-101(B)(2) has no applicability. Similarly, *Nix v. Whiteside*, *supra*, does not sanction Gill's action.

[I]t is settled that private persons acting in concert with government officials subject themselves to section 1983's reach. *Adickes v. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 1605, 16 L. Ed. 2d 142 (1970); *United States v. Price*, 383 U.S. 787, 794, 86 S. Ct. 1152, 1156, 16 L. Ed. 2d 267 (1966).

Chertkof v. Mayor & City Council of Baltimore, 497 F. Supp. 1252, 1258 (D. Md. 1980). Accord: *Taylor v. Gibson*, 529 F.2d 709, 715 (5th Cir. 1976); *Downs v. Swatelle*, 574 F.2d 1, 15 (1st Cir. 1978), *certiorari denied*, 439 U.S. 910 (1978).

As set forth in the Statement, *supra*, this record clearly permits an inference that there was an agreement between the prosecutor and Gill that Gill would furnish for the prosecutor's use, and the prosecutor would accept from Gill, information relevant to the Hooper case. There was a discussion between Gill and the prosecutor before the information was revealed, and the prosecutor first satisfied himself that the information did not come directly from Dr. Hooper. That evidence is sufficient to support a conclusion there was an agreement to accept and convey the information. We respectfully submit that if such an agreement is found by the trier of fact, Dr. Hooper's Fifth, Sixth, and Fourteenth Amendment rights were violated, and that Gill became liable under 42 U.S.C. 1983.

In order to prove the existence of a civil conspiracy, a plaintiff is not required to provide direct evidence of the agreement between the conspirators; "[c]ircumstantial evidence may provide adequate proof of conspiracy." [Citations in the Opinion omitted.] Absent the testimony of a conspirator, it is unlikely that direct evidence of a conspiratorial agreement will exist. Thus, the question whether an agreement exists should not be taken from the jury so long as there is a possibility that the jury can 'infer' from the circumstances [that the alleged conspirators] had a 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's objectives. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970).

Hampton v. Hanrahan, 600 F. 2d 600, 621 (7th Cir. 1979), *modified in other respects*, 446 U.S. 754 (1980), *rehearing denied*, 448 U.S. 913 (1980). The mere statement by the participants in the alleged conspiracy that there was no agreement or conspiracy does not *ipso facto* take the case from the jury.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

Allen H. Sachsel
3251 Old Lee Highway, Suite 516
Fairfax, Virginia 22030
(703) 691-0130

Wilbur H. Friedman, Jr.
(Counsel of Record)
1717 Pennsylvania Avenue, N.W.
Room 863
Washington, D.C. 20570
(202) 254-9329

Paul R. Wiesenfeld
932 Hungerford Drive
Suite 20
Rockville, Maryland 20850
(301) 762-5525

Stephen A. Armstrong
10335 Democracy Lane
Fairfax, Virginia 22030
(703) 241-2855



M A R Y L A N D:

IN THE COURT OF APPEALS
OF MARYLAND

JAMES L. HOOPER	:	
	:	
Plaintiff,	:	Petition Docket
	:	No. 297
v.	:	
	:	September Term,
JOHN GILL, et al.	:	1989
	:	(No. 1311, Septem-
Defendant.	:	ber Term, 1989
	:	Court of Special
	:	Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied, as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 20, 1989

JAMES L. HOOPER

v.

JOHN GILL, et al.

Argued before GILBERT, C.J., and
BLOOM and WENNER, JJ.

No. 1311, September Term, 1988
Court of Special Appeals of Maryland
June 1, 1989

GILBERT, Chief Judge.

Dr. James Hooper in 1980 retained John Gill, Jr., a partner in the law firm of Gill & Sippel, for defense against charges of medicaid fraud. Dr. Hooper discharged the firm in 1981. Soon thereafter, Gill & Sippel claimed that \$5,400.00 was owing in unpaid legal fees.

According to Dr. Hooper, Gill threatened that he would take certain actions if the outstanding portion of the bill was not paid. Dr. Hooper alleged that Gill claimed that he would inform the Attorney General's Office that a witness their office had previously interviewed lied during questioning, and that, if questioned further, the witness could aid the State in the criminal prosecution of Dr. Hooper.¹ In any event, Gill & Sippel sued Dr. Hooper for the additional attorney's fees.² The Circuit Court for Montgomery County granted Gill & Sippel's motion for judgment in the full amount, and Dr. Hooper appealed. A settlement was reached while the appeal was pending,³ in consideration of which the firm obtained a General Mutual Release from Dr. Hooper of all claims and causes of action known and unknown.

The medicaid fraud case against Dr. Hooper was dismissed because the State could not prove a *prima facie* case. Thereafter, Dr. Hooper unsuccessfully sued the then Attorney General of Maryland and others. During dis-

1. Gill disputes that the conversation occurred, although through counsel he admitted that he did in fact disclose information to an Assistant Attorney General. According to what we were told on oral argument, Gill possessed for "several months" the knowledge of the witness's allegedly incomplete statement. Disclosure apparently came only after Dr. Hooper refused to pay the additional \$5,400.00 although Gill denied that nonpayment motivated his revealing the matter to the prosecution.

2. The action was instituted in the District Court of Maryland for Montgomery County but removed to the circuit court pursuant to Dr. Hooper's jury trial demand. Although appellees originally sought \$5,000, the jurisdictional limit of the District Court, upon the removal of the case to the circuit court, they amended their claim to \$5,400.

3. We were informed that the matter was settled for \$4,400.00.

covery proceedings in that particular case, a memorandum was found indicating that Gill had carried out his threat to relay information to the prosecutor. According to the memorandum, the prosecutor was prompted by Gill's revelation to re-interview the witness.

As a result of what he learned during discovery, Dr. Hooper filed the instant action against Gill, et al., in the Circuit Court for Montgomery County (Messitte, J.), alleging tortious and contractual breach of fiduciary duties, a violation of 42 U.S.C. § 1983, and fraud. Dr. Hooper also sought an equitable opening of the judgment in the already settled attorney's fee suit. Judge Messitte granted Gill's Motion For Judgment as to the breach of fiduciary duty claims, entered summary judgment in favor of Gill on both the fraud and 42 U.S.C. § 1983 allegations, and further granted Gill's motion to strike the claim seeking an equitable opening of the satisfied judgment. Aggrieved by the actions of the circuit court, Dr. Hooper has journeyed here where he raises four issues; namely, whether the trial judge erred in:

- (1) excluding the expert testimony of Abraham Dash and in turn granting Gill's Motion for Judgment on the tortious and contractual breach of fiduciary duty counts;

- (2) granting summary judgment in favor of Gill on the fraud claim;

- (3) refusing to open and re-litigate the judgment in the fee suit; and

- (4) granting Summary Judgment in favor of Gill on the 42 U.S.C. § 1983 claim.

(1)

[1] The allegations involving tortious and contractual breach of fiduciary duty focus on alleged legal malpractice. In order to establish a cause of action against an attorney for legal malpractice, a plaintiff must prove: "(1) the attorney's employment; (2) his neglect of a reasonable duty; and (3) loss to the client proximately caused by that neglect of

duty." *Flaherty v. Weinberg*, 303 Md. 116, 128, 492 A.2d 618 (1985).

[2] Expert testimony is necessary in a legal malpractice case to establish the existence of a breach of a reasonable legal duty, except in that class of cases "where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence from the facts." *Central Cab Co. v. Clarke*, 259 Md. 542, 551, 270 A.2d 662 (1970); *Fishow v. Simpson*, 55 Md.App. 312, 318-319, 462 A.2d 540 (1983).

Dr. Hooper sought to introduce the expert testimony of Professor Abraham Dash in an attempt to establish Gill's tortious and contractual breach of fiduciary duty. Professor Dash advised the court that he was not qualified to testify as an expert as to whether Gill's disclosure to the Assistant Attorney General was a breach of the civil standard of care for an attorney. Dash stated that his expertise was limited to the attorneys' Code of Professional Responsibility. Nevertheless, Dr. Hooper's counsel claimed that he was going to rely on Dash's testimony to establish causes of action for breach of contract and tortious breach of duty.

Judge Messitte precluded Dash's testimony and granted Gill's Motion For Judgment. The court reasoned that Dr. Hooper was required to establish, through expert testimony, that Gill's action was a breach of fiduciary duty as a matter of law and not merely a breach of the Code of Professional Responsibility. Dr. Hooper contends that the trial judge erred in making that determination. He asserts that the Code of Professional Responsibility provisions pertaining to an attorney's fiduciary duty simply codify the common law. On that premise Dr. Hooper argues that expert testimony was not required, and that Gill was liable as a matter of law.⁴

⁴ In light of our disposition of this case, it is unnecessary to determine whether expert testimony is required concerning an ethical violation. But see *Fishman v. Brooks*, 396 Mass. 643, 487 N.E.2d 1377, 1381-82 (1986).

Maryland Rule 1230 currently contains a statement that the Rules of Professional Conduct do "not give rise to a cause of action."⁵ No similar provision was embodied in the Code of Professional Responsibility in effect in 1981. See then Md.Rule 1230; Appendix F.

Maryland appellate courts do not appear to have previously decided whether an attorney's violation of the Code of Professional Responsibility gives rise to a civil cause of action for damages. Decisions from other jurisdictions, however, are instructive.

There appear to be at least three ways that courts have disposed of suits brought against attorneys for violating the Code of Professional Responsibility:

1. *The General Rule—No Cause of action.* This method holds that violation of the Code does not give rise to a civil cause of action. It has been adopted by the overwhelming majority of courts. See *Noble v. Sears, Roebuck & Co.*, 33 Cal.App.3d 654, 109 Cal.Rptr. 269 (1973); *Bickel v. Mackie*, 447 F.Supp. 1376 (N.D.Iowa 1978); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Hill v. Willmott*, 561 S.W.2d 331 (Ky.App.1978); *Drago v. Buonaguria*, 46 N.Y. 2d 778, 413 N.Y.S.2d 910, 386 N.E.2d 821 (1978); *Bud Godfrey Pontiac, Inc. v. Roloff*, 291 Or. 318, 630 P.2d 840 (1981); *Martin v. Trevino*, 578 S.W.2d 763 (Tex.Civ.App. 1978); *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980). The basis for this rule, as stated by the Supreme Court of Oregon in *Bud Godfrey Pontiac, Inc.*, 630 P.2d at 848, is that:

5. Maryland's Rules of Professional Conduct expressly provide in the preamble that:

"Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Md. Rule 1230; Appendix: The Maryland Lawyers' Rules of Professional Conduct, 479 (1989).

"(a) The statute or Code of Professional Responsibility was not intended to create a private cause of action. On the contrary, the sole intended remedy for a violation of such a statute or code is the imposition of discipline by disbarment, suspension or reprimand of the offending attorney. See, e.g., *Martin v. Trevino*, *supra*, at 770; *Bickel v. Mackie*, *supra*, at 1383; *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, [358 F.Supp. 17 (E.D. Tenn.1972)] at 22; *Hill v. Willmott*, *supra*, at 333-34, and *Noble v. Sears, Roebuck & Co.*, *supra*, 109 Cal.Rptr. at 271-72. See also *Brody v. Ruby*, ... at 907-08; *Spencer v. Burglass*, ... [337 So.2d 596 (La.App.1976)] at 600-01, and *Tingle v. Arnold, Cate & Allen*, ... [129 Ga.App. 134], 199 S.E.2d [260] at 263.

(b) Other remedies, such as malicious prosecution, adequately protect the public from harassment or abuse by unprofessional lawyers. See, e.g., *Nelson v. Miller*, ... [227 Kan. 271], 607 P.2d [438] at 451, and *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, ... at 22.

(c) To expose attorneys to actions for damages for breach of ethical duties imposed by such statutes and codes would be contrary to the 'obvious public interest' in affording every citizen 'the utmost freedom of access to the courts.' See, e.g., *Lyddon v. Shaw*, ... [56 Ill.App.3d 815], 14 Ill.Dec. [489] at 494, 372 N.E.2d [685] at 690, and *Hill v. Willmott*, *supra*, at 334. See also *Brody v. Ruby*, *supra*, at 907."

2. *The Michigan Rule—Violation Rebuttable Evidence of Malpractice.* This particular method holds that violation of the Code of Professional Responsibility constitutes rebuttable evidence of malpractice. Michigan seems to be the only State that has adopted that manner of dealing with suits brought against attorneys for violations of the Code. *Lipton v. Boesky*, 110 Mich.App. 589, 313 N.W.2d 163 (1981). See also *Sawabini v. Desenberg*, 143 Mich.App. 373, 372 N.W.2d 559 (1985).

3. *The Massachusetts Rule—Violation No Cause of Action But Evidence of Negligence.* This resolution of the

problem was espoused by the Supreme Judicial Court of Massachusetts in *Fishman v. Brooks*, 396 Mass. 643, 487 N.E.2d 1377, 1381 (1986). Insofar as we have been able to determine, Massachusetts is the sole advocate of this particular treatment of civil actions against attorneys for Code violations. The court likened a violation of a Code provision to the violation of a statute, i.e., liquor law, workers' compensation, and building codes. 487 N.E.2d at 1381.

[3] Although we have, via *dicta*, articulated the three-fold methods by which courts have thus far dealt with civil suits based on violations of the Code of Professional Responsibility, we need not and do not decide what course Maryland will steer in these controversies. Our reason for declining to answer the specific question is that the issue is simply not viable because Dr. Hooper failed to prove any damages. His allegations, if true, fit squarely within the ambit of the Latin phrase: *injuria absque damno* (injury or wrong without damage).

The facts show that at the time Gill spoke with the Assistant Attorney General relative to the witness's allegedly incomplete statement an indictment had already been returned against Dr. Hooper. Thus, the information supplied by Gill did not contribute to the obtaining of the indictment.

The errant witness, although apparently re-interviewed, was not called to testify at the trial of Dr. Hooper on the medicaid fraud indictment. Therefore, it is reasonable to infer that whatever information the State may have learned as a result of the re-interview of the witness did not contribute to the State's case against the doctor. Even if it did, there nevertheless remains the one overriding factor in our analysis—the singular fact that Dr. Hooper was acquitted of the medicaid fraud charge.

As this case reaches us, it is apparent from the record that no damage to Dr. Hooper was proven to have occurred as the result of Gill's alleged breach of confidentiality. Since there were no damages, there can be no recovery.

There is, of course, the claim to be made that, even though actual damages were not shown, the doctor is nevertheless entitled to nominal damages as a result of the breach of confidence. We turn that contention aside because the amount recoverable, if actionable, is absolutely *de minimis* in view of the costs in judicial time of retrial on the sole issue of nominal damages.

(2)

[4, 5] Dr. Hooper next contends that he was entitled to a return of the money he paid in settlement of the attorney fee suit because Gill fraudulently obtained the General Mutual Release. In the circuit court Dr. Hooper argued that the alleged breach of duty would have been a defense to Gill's suit for the fee. Judge Messitte disagreed. Since the disclosure by Gill did not cause any damage to Dr. Hooper, we affirm the trial court's ruling. Proof of compensatory damage directly resulting from an act is a necessary element of a cause of action grounded in fraud. *Schwartzbeck v. Loving Chevrolet*, 27 Md.App. 139, 339 A.2d 700 (1975).

Dr. Hooper also avers that Gill's failure to disclose his communication to the prosecutor concerning the allegedly evasive witness constituted fraud and invalidated the release that was signed in the settlement of the fee dispute litigation. Judge Messitte, however, did not decide the issue, and we do not because it is not properly before us. Md. Rule 8-131(a).

Judge Messitte ruled that, in order to prevail on the fraud count, Dr. Hooper needed to establish that: (a) he would not have settled the fee suit and executed the General Release if he had known of Gill's revelation to the prosecutor, and (b) he would have prevailed on appeal of the fee suit to this Court based solely on the record. The circuit court held that Dr. Hooper would not have prevailed on his appeal based solely on the record and, therefore, entered summary judgment in favor of Gill. We cannot say that Judge Messitte was in error.

To reopen the satisfied judgment in the fee case, Dr. Hooper filed a petition for a Writ of Error *Coram Nobis*⁶. The petition was denied. This Court in *Hooper v. Gill & Sippel*, Per Curiam, No. 474, Sept. Term, 1988, filed December 8, 1988, affirmed the denial of writ on the ground that the circuit court did not abuse its discretion since the relief sought in the petition/motion was identical to the relief requested in this case. There, we observed that during oral argument Dr. Hooper's counsel conceded that, for purposes of that case, there was no difference between Md. Rule 2-535(b) and the Writ of Error *Coram Nobis*. Rule 2-535(b) provides: "(b) *Fraud, Mistake, Irregularity.*—On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity."

[6] Assuming, *arguendo*, that fraud did occur, it most certainly took place after Dr. Hooper had discharged Gill and the latter's legal services were terminated. Gill was entitled to be paid compensation. The post-professional services fraud would not be a defense to a suit for the fees. Judge Messitte did not err in denying the doctor's petition for a Writ of Error *Coram Nobis*.

(4)

[7] In its pretrial rulings the circuit court granted summary judgment in favor of Gill on Dr. Hooper's 42 U.S.C. § 1983 claim. The court found that Dr. Hooper did not establish that Gill acted in concert with the Attorney General's Office. Hence, Gill could not have acted "under color of state law" since he held no State office. Because he did

6. *Black's Law Dictionary* 1444 (5th ed. 1979) defines writ of *error coram nobis* as:

"[a] common-law writ, the purpose of which is to correct a judgment in the same court in which it was rendered, on the ground of error of fact ... which fact did not appear of record, or was unknown to the court when judgment was pronounced, and which, if known, would have prevented the judgment...."

not act "under color of state law," there can be no recovery under the federal code.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

M A R Y L A N D:

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY

JAMES L. HOOPER	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 16791
JOHN GILL,	:	
	:	
Defendant.	:	

ORDER

Upon the Motions to Dismiss filed by Defendant Gill, the Plaintiff's Opposition thereto and counsel having been heard on February 17, 1987, it is this 17th day of February, 1987, by the undersigned, one of the Judges of the Circuit Court for Montgomery County, hereby

ORDERED that Defendant Gill's Motion to Dismiss Counts I, II, and III of the Third Amended Complaint is granted without leave to amend only as to the claims for emotional distress, and is otherwise denied, without prejudice to refileing, as set forth, infra; and

ORDERED that Defendant Gill's Motion to Dismiss Count IV of the Third Amended Complaint is DENIED; and

ORDERED that counsel conduct necessary discovery concerning Defendant's arguments that the Plaintiff suffered no damage as a result of the alleged acts, errors, or omissions of the Defendant and that the Plaintiff cannot allege a violation of 48 U.S.C. Section 1983, within one hundred twenty (120) days of February 17, 1987, after which Defendant, if he elects, may refile his Motion to Dismiss as to Counts I, II, and III, on said grounds, promptly after the expiration of said time.

/s/ Peter J. Messitte
Judge of the Circuit
Court for Montgomery
County

APPROVED AS TO FORM:

/s/ Allen H. Sachsel
ALLEN H. SACHSEL
Attorney for Plaintiff

M A R Y L A N D:

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY

JAMES L. HOOPER	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 16791
JOHN GILL,	:	
	:	
Defendant.	:	

ORDER

Upon the foregoing Motion for Partial Summary Judgment, it is this 12th day of May, 1988, by the undersigned, one of the Judges of the Circuit Court for Montgomery County, hereby

ORDERED that Defendants' Motion for Partial Summary Judgment be and hereby is GRANTED; and it is

ORDERED that Defendant Gill's alleged breach of fiduciary duty set forth in Counts I and II of the Third Amended Complaint would not have been a defense to the fee suit, Gill and Sippel v. James L. Hooper, Circuit Court for Montgomery County, Law No. 58524; and it is

ORDERED that in order for the Plaintiff to prevail on Count IV of the Third Amended Complaint he must establish (a) that he would not have settled Law No. 58524 and executed the General Release but for the Defendants' failure to disclose Mr. Gill's communication with Dale Kelberman concerning the testimony of Mary Gertrude Horney and (b) he would have prevailed on the appeal of Law No. 58524 to the Court of Special Appeals of Maryland based solely on the record developed before the trial court (Circuit Court for Montgomery County; and it is

ORDERED, that the issue of whether the Plaintiff would have settled Law No. 58524 and executed the General Release but for the Defendants' nondisclosure will be decided by the jury, and the Court will decide the issue of whether the Plaintiff would have prevailed in his appeal to the

Court of Special Appeals based only on the
record therein.

/s/ Peter J. Messitte
Judge of the Circuit
Court for Montgomery
County

M A R Y L A N D:

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY

JAMES L. HOOPER	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 16791
JOHN GILL,	:	
	:	
Defendant.	:	

ORDER

Upon consideration of Defendants Thomas J. Sippel and Gill & Sippel's Motion to Dismiss Counts I, II and II of the Third Amended Complaint, it is this 26th day of August, 1987, by the undersigned, one of the Judges of the Circuit Court for Montgomery County, hereby

ORDERED, that Defendants' Motion to Dismiss Counts I, II and II of the Third Amended Complaint is hereby GRANTED, in that the Plaintiff's claims for emotional distress damages against John G. Gill, Sr. and Thomas J. Sippel and Gill & Sippel in Counts I, II and III of the Third Amended

Complaint are hereby, DISMISSED WITH
PREJUDICE.

/s/ Peter J. Messitte
Judge of the Circuit
Court for Montgomery
County

/s/ Shirlye Norris Lake
SHIRLIE NORRIS LAKE
Eccleston and Seidler
110 East Lexington Street
Baltimore, Maryland 21202
(301) 752-7474

M A R Y L A N D:

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY

JAMES L. HOOPER	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 16791
JOHN GILL,	:	
	:	
Defendant.	:	

ORDER

Upon Defendants' Motion for Summary Judgment and Plaintiff's Opposition thereto, oral argument having been heard on August 26, 1987, it is this 1st day of March, 1988, by the undersigned, one of the Judges of the Circuit Court for Montgomery County, hereby

ORDERED that Defendants' Motion for Summary Judgment as to Counts I and II is GRANTED IN PART and DENIED IN PART; specifically, the Motion is DENIED as to liability in Counts I and II; however, in the event the Plaintiff is able to establish liability on either Count I or Count II, his compensatory damages are

limited to \$1.00 in nominal damages, and the claim for punitive damages in Counts I and II is DISMISSED WITH PREJUDICE; and it is hereby

ORDERED that Defendants' Motion for Summary Judgment as to Count III is GRANTED, and Count III is DISMISSED WITH PREJUDICE; and it is hereby

ORDERED that Defendants' Motion for Summary Judgment as to Count III is GRANTED, and Count III is DISMISSED WITH PREJUDICE; and it is hereby

ORDERED that Defendants' Motion for Summary Judgment as to Count IV is GRANTED IN PART AND DENIED IN PART; specifically, Defendants' Motion is DENIED as to liability on Count IV; however, in the event the Plaintiff is able to establish liability on Count IV, his damages are limited to a maximum of \$4,400.00 in compensatory damages and punitive damages if actual compensatory damages are awarded; and

ORDERED that the issue of whether Plaintiff would have settled Law No. 58524 and executed the General Release but for the Defendants' nondisclosure will be decided by the jury, and the Court will decide the issue of whether the Plaintiff would have prevailed in his appeal of that case to the Court of Special Appeals, based only in the record herein, apart from Defendant's alleged breach of fiduciary duty.

/s/ Peter J. Messitte
Judge of the Circuit
Court for Montgomery
County

M A R Y L A N D:

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY

JAMES L. HOOPER	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 16791
JOHN GILL,	:	
	:	
Defendant.	:	

THE COURT: All right. The Court is ready to decide this issue. You always take a stab at it and know that somebody is looking over your shoulder, so if I am right or wrong we will see.

The issue that the Court has to decide is whether an admitted expert on the canons of ethics in Maryland can testify that the alleged actions by the defendant in this case were violations of those -- the canons of ethics, and then on the basis of that testimony, and nothing further, would the plaintiffs be able to argue to the jury that the testimony of the violation of the canon of ethics would

constitute a basis for which they could make a finding of a breach of contract or a tortious breach of fiduciary duty.

Now, the alleged act as we know in this case is said to have been a communication by Mr. Gill to the attorney general's office following the termination of his employment by Dr. Hooper relative to Mr. Gill's belief that a witness -- not his client -- had spoken falsely or perjured herself to the attorney general's office relative to certain actions that I assume that Dr. Hooper's office took, and the question is whether that act is violative of the rules, and then if violative of the rules would form the basis for civil liability.

Let us be clear on the record about the rules we are speaking of. The first rule that we speak of is disciplinary rule 4-101 which deals with the preservation of confidence or the secrets of a client, and basically indicates that except where permitted a lawyer shall not knowingly

reveal a confidence or secret of his client. That is just rule 4-101.

There seems to be another disciplinary rule, DR 7-101 that may be -- maybe I am wrong.

MS. LAKE: I believe it is 102(b), Your Honor.

THE COURT: 7-102, excuse me, representing a client within the bounds of the law which may cut in another direction, and that suggests that under the subpart (b) of 7-102 that a lawyer who receives information clearly establishing that a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal which is essentially what Mr. Gill is relying on.

Profession Dash says that is not an appropriate exception in this case because the revelation would not have been made to the tribunal, but would have been made to some representative of the executive branch.

I think that poses the issue, and now, as I say, the contention is made by the --

MS. LAKE: Your Honor, there is one other rule that Mr. Dash referred to. It is the same 4-101, but it is (c) which sets out the circumstances under which a lawyer may reveal a confidence or secret, and (c) (2) is the one that we maintain is applicable.

THE COURT: You are quite right, that 4-101(b) indicates that except when permitted under 4-101(c), and 4-101(c) indicates that a lawyer may reveal confidences when permitted to under the rules which are applied by law -- which is the transition to 7-102 that we spoke about.

All right. Now, that seems to me to set the stage, and the question then is really one of law at this point that the Court must decide whether given that a cause of action is stated.

The Court has had its attention to Lipton versus Bosky, interestingly, Court of Appeals of Michigan, which appears at 110 Michigan at 589, 313 Northwest Second 163, a 1981 case.

In that case the Court says in most specific language, "We hold that as with statutes a violation of the code is rebuttable evidence of malpractice. It referred to the code of professional responsibility as the standard of practice of attorneys expressing in general terms the standard of professional conduct expected of lawyers in their relationship with the public in the legal system and the legal profession, and the Court says at 313 Northwest Second 166-167, "Holding a specific client and [sic] unable to rely on the same standards in his professional relations with this attorney would be patently unfair."

Now, it appears that in that case that the -- among other things, the attorney refused to oppose a motion for

summary judgment and allowed summary judgment to be entered against his client in violation of disciplinary rule 2-110 allowing a default action [sic] to be entered against another party in violation of disciplinary rule 6-101, failed to file a lawsuit in violation of disciplinary rule 7-101, 6-101(a)(3) and 1-102(a)(4). Made misrepresentations to the plaintiff that would releave [sic] them of the liability regarding relieving them of liability in violation of disciplinary rule 6-101, 1-101(2)(a)(4) and made various other negligent representations, I guess, as far as the plaintiff.

That case seems to bend [sic] in sum for the proposition that violations of ethical rules, codes of professional conduct can give rise to a cause of action. That is the one case that four square holds that proposition as far as the plaintiff is concerned.

Weighed against that are a number of cases that seem rather clearly to suggest that a violation of a code of professional responsibility does not give rise to a civil action. They are set out in the defendant's [sic] memorandum of law in support of the motion in limine re dash [sic] testimony at page three, and I have looked at these cases as we have kept this jury cooling in the lobby.

I am just going to start pulling some of these cases and cite the appropriate language and do my best to characterize where we are.

Dillard versus Broyles was cited as a principal case by the defendants which appears at 633 Southwest Second 636, a case from the Court of Appeals of Texas which is not the Supreme Court of Texas.

Well, that case actually is less helpful than some of the others. This says that 633 Southwest Second at 643 that the Court refused to permit testimony by experts, free [sic] licensed attorneys, on

the issue of representation of conflicting interest [sic] by an attorney. It appears at 643. Quote, "Each of the witnesses, after qualifications were given, a detail [sic] hypothetical situation paralleling the facts in this case that they were then asked if in their opinion it would be a violation of the canon of ethics prohibition against representation of conflicting interest [sic] for an attorney who represented both buyer and seller in closing a real estate transaction to later represent the seller in his attempt to collect his unpaid note and to fulfill his duty as a trustee of a deed of trust in foreclosing upon the buyer.

The trial Court refused to allow the jury to consider such testimony. The ruling was a matter of law for the Court did [sic] decide.

Now, it may well be that the Judge heard that and not the jury, so that may be the issue that we are dealing with in

that case; less direct, perhaps, than some of the other cases that are cited.

Nobel versus Sears and Roebuck and Company, which appears at -- a California intermediate appeals case which appears at 109 Cal Reporter at 269.

271 says that plaintiff's first argument is that the intrusion in the attorney client relationship between plaintiff and her attorneys is a tort for which the client may recover damages. It goes on to cite Rule 12 of the California rules.

Plaintiff cites a case for the proposition that her attorney is subject to disciplinary action by the State Bar, also may be held liable, therefore, in damages.

It goes on to say that case is not authority for the proposition that a lawyer who is subject of disciplinary action by the State Bar is thereby made subject to a civil action for damages whether or not an established tort has

been committed by the lawyer, and that seems to be the key; that the mere fact of violation would not in itself give rise to the testimony [sic] unless a separate tort was [sic] also alleged.

In Bickel versus Matthew, 447 F. Sup. 1376, a further elicited [sic] opinion from Iowa, the Court says at page 1383 that a complaint was made that a duty was owed to the plaintiff to comply with the rules of civil procedure relating to the certifying that a suit was brought in good faith, and the code of professional responsibility prescribing adequate preparation and prescribing participation in suits -- the Court disagrees with this theory.

The violation of the code of professional ethics is not tantamount to a tortious act, particularly with regard to liability to a non-client -- that happens to go off on a non-client point.

The implication there clearly is whether it is a client or non-client that

the rules themselves are norms expressing in general terms a standard of conduct, and it seems to suggest that there is no independent liability. If there is no independent liability established in a recognized cause of action, mere violation of the ethical consideration would not give rise to liability.

In Hill versus Wilmot which is 561 S. Second 331, Kentucky Court of Appeals case, it indicates that the sole -- for violation of the code is the imposition of disciplinary measures after a hearing by the board of revenue [sic] and so on.

Nowhere does the code of professional responsibility or the rules attempt to establish standards of civil liability of attorneys for their professional negligence.

This is not to say that a cause of action cannot be asserted for negligence on the part of an attorney. All we are holding is that the duty set forth in the code and the rules establish the minimum

level of confidence for the protection of the public and a violation thereof does not necessarily give rise to a cause of action.

Again, this is all tending to suggest that mere violation of a code does not give rise.

In another case, *Iudiz versis Kidd*, at 266 Southeast Second, 108, a Virginia Supreme Court case, goes on to say that citing an Iowa case, "We agree that the role of professional responsibility is no basis for a private cause of action, although, of course, in the appropriate case, disciplinary proceedings can be instituted against the offending lawyer."

Now, the case that -- having gone through all that, I have another case from another jurisdiction which seems to suggest -- some of these are drawn on the context of suits brought by non-clients against attorneys, but the case that in quick review seems to be most on point is *Bobdockery Pontiac, Inc., versus Rolof*

which appears at -- the Supreme Court of Oregon, 1981, appears at 630 P. Second 840.

In this case the attorneys were former attorneys for the parties that were suing them, and there is a section of this opinion entitled Civil Liability based upon violation of a statutory duty.

The Court specifically undertakes to consider the question of whether violation by an attorney to [sic] ethical duty imposed by statute or by a code of professional responsibility gives rise to a new and private cause of action for damages independent of the common law and then goes on to consider cases in which liability would be based on violation of a statutory duty when there is also an underlying common law cause of action and cases in which liability would be based upon a violation of the statute when there is no underlying common law duty, and they talk about the underlying duty cases where the standard elements of negligence must

be shown, and if that happens to violate the statute, so be it, but is is also a violation of common law negligence.

It talks about the Court recognizing or inferring new private causes of action for violation of a statute. "If there is any chance that invasion into the field by the course of establishing a civil cause of action might interfere with the total legislative scheme, the Court must err on the side of nonintrusion because it is highly possibly for the legislature to establish such a civil cause of action if it desires.

Then it discusses cases in which a violation of the insurance code prohibiting certain conduct does not give rise to a tort action.

All right. Let me see now. "Other Courts have addressed the question of whether an attorney's violation of statutory duty as a professional responsibility gives rise to a private cause of action.

All of the Courts that have directly considered this question have held that it does not, and then goes on to a series of citations, a Georgia case, a statute prohibiting solicitation; a Tennessee case, a statute prohibiting a district attorney from having private practice; and probably cites 15 to 20 cases.

The footnote says, "Some of these cases do not involve a violation of statutory duties, but involve violations of the code of professional responsibility citing several. None of these decisions, however, mention the statute CPR -- the Code of Professional Responsibility -- distinction as a factor, and the reasoning employed in most of the cases would seem equally applicable to statutory duties as well as the duties under the CPR.

It also appears that most of the writers on this subject approved the rule as stated by these Courts, citing names that may be familiar to Profession Dash of Birnbaum, Bode, also Malon and Levit at

51.5, but -- in every event, the principal reasons for this rule as stated in the opinions by these courts is as follows:

A. The statute or code of professional responsibility does not intend to create a private cause of action. On the contrary, the sole intended remedy for the violation of such statute or code is the imposition of discipline by the department of suspension or reprimand of the offending attorney, citing cases.

B. Other remedies such as malicious prosecution adequately protect the public from harrassment or abuse by unprofessional lawyers.

C. To expose attorneys to actions for damages for breach of ethical duties imposed by statute and codes would be contrary to the obvious public interest in affording every citizen the utmost freedom of access to the Court.

Well, there is a dessenting opinion in that case by Justice Linn who is a well

known justice, but the Court in reading this on the fly is convinced that the balance of the opinion in the United States suggests that merely testifying that there is a violation of an ethical precept of the code of professional responsibility does not by itself give rise to a cause of action unless it is otherwise stated.

There has been some effort on the part of plaintiff to suggest that every contract involves the conformity to ethical precept, but if that were true, that would undercut everything that all these other cases have said because the same ethical consideration was part of all these other cases, obviously, and yet it wasn't deemed to be a violation -- a breach of any kind of implied contract in any of these cases.

Basically, the situation was such that the mere testimony as to the violation of the ethical consideration would not in and of itself suffice to

establish the standard owed -- whatever we call it, whether it is care or duty, and if that is as far as Professor Dash can go in this case, the Court is inclined to agree with the defendant that that would not suffice and to permit the jury to hear it at this point would simply be to create some confusion subject to a motion to strike which I would have to do at the end of Professor Dash's testimony and say that this testimony really does not belong in the case.

Now, having said that, where does that leave us?

MS. LAKE: Well, Your Honor, once plaintiff rests, we will move for summary judgment because there is no testimony -- we would have done it with or without Mr. Dash's testimony because it doesn't go to the issue -- without an expert witness on that stand who can say that Mr. Gill breached his attorney client contract, his duty, or whatever you want to call it, this case, according to the law in

Maryland, Fishall versus Sympson and Central Cab versus Clark, cannot go to the jury.

So I would renew our motion for summary judgment as a motion for judgment at the end of the plaintiff's case. I understand that it is premature. They haven't rested, but --

MR. SACHSEL: Your Honor, I don't know whether I am making our position clear or not. We are not saying that the only basis for liability is the code of professional responsibility.

What we are saying is that there is a common law fiduciary duty. Now, the fact of the matter is that I don't think that the plaintiff needs expert testimony. This is a question of law. It is a question of law for the Court. The primary reason that we got even into expert testimony is that because Mr. Gill consistently has tried to justify his actions based on the canons of ethics, and I will be very candid with you. But for

that, I would not even have looked for an expert to put on.

THE COURT: Let's leave it aside. Maybe this is more properly addressed on a motion for directed verdict. You are at the point now -- let's assume that we will not hear from Professor Dash although the proffer has been made, so your record is there.

You still have to make a prima facie case to get to the jury. When the motion for directed verdict comes, we are going to evaluate whether you have got enough without expert testimony to go to the jury, and the prospect is unless you are going to call an expert to say that what he did breached some common law duty, it just doesn't go to the jury in and of itself. It just doesn't.

That is not such a black and white case that lets him say what he did in this case is anything without expert testimony to characterize it as something.

That is what you are left with. Now, it may not be -- I hear what you are saying. You are saying that it is common law, but you have to still show the standard and the deviation. Whether it is contract or whether it is tort, you have still got to do that. You can't just get up and say to a jury, "Look at what he did. Do you think it is wrong?"

Cases don't go to juries on the basis of that, so that is the problem that you have still got. I agree that you don't have to pin all necessarily on Professor Dash, but if nobody else comes next, I am not sure what you do, and I will rule at the end of your case.

MR. SACHSEL: Well, the fact of the matter is -- you know, I don't know how you find an expert on a lawyer-fiduciary duty now. I mean, you know, we are all lawyers, and all Mr. Dash is saying is that his opinion is simply that of a lawyer, but he is not an expert in civil fiduciary duties of lawyers.

Am I correct, Mr. Dash?

THE COURT: Look, Mr. Sachsel, I think that I am really only saying to you that my reading of these cases -- and I admit that I am giving you an opinion on the fly. You have to do that as a trial Judge all the time, but there is more bulk here and there is more reason that seems to say to me that the mere violation of a code of professional responsibility does not give rise to a civil action.

It may well give rise -- it obviously does give rise to some complaint in the grievance field.

MR. SACHSEL: That is a different issue.

THE COURT: Okay, but that is what it says, and then the issue is if all your witness can talk about -- and he has said this, that this constitutes a violation of an ethical precept, you are four square within these cases, and that isn't enough if that is all you have got to create a cause of action.

If you have got some other witness who will say apart from the ethical issue or in addition to the ethical issue there is a deviation from the acceptable conduct -- whatever the term is that we are going to use here, then you may have a jury issue, but without it you have got a problem.

MR. SACHSEL: Your Honor, I beg to differ with you.

THE COURT: Well --

MR. SACHSEL: And we have differed a lot throughout this case, but I think we have a question of law, and I think it is up to you to rule as to what the fiduciary duties are. This Court is competent to do that. We may not agree with the result you reach, but, nonetheless, I think it is a question of law.

THE COURT: Mr. Sachsel, I am prepared to concede that a lawyer should not divulge confidences, and I think I am even prepared to concede for purposes of argument that Mr. Gill shouldn't have done

what he did, but that doesn't state a civil cause of action according to these cases. It does give the basis for perhaps a reference to a grievance committed, [sic] but it doesn't give a --

Ms. Lake:

MS. LAKE: Yes, well, he has just said, Your Honor -- the Maryland Court of Special Appeals has specifically indicated in Fishi versus Sympson which is one of the cases that said that you need expert testimony when you are suing an attorney is that a judge cannot take judicial notice of the standard of care required of attorney.

MR. SACHSEL: This is a negligence case, Your Honor.

MS. LAKE: It is a case against an attorney for breach of his duty or breach of a contract.

THE COURT: I think what I have said -- and I may be offering more of an opinion that I need to. I don't think it really matters assuming that I say that he

did something improper and breached a fiduciary duty of some sort.

I am saying on the basis of these cases that it doesn't give rise to a separate civil action. That is what these cases -- particularly the Bobgodfred Pontiac case seems to say.

MR. SACHSEL: Well, I would proffer to the Court the canons of ethics. I think the Court can interpret them like statutes.

I agree that in a negligence case it often is required -- even in some negligence cases, by the way --

MS. LAKE: Fishal was a breach of contract case.

THE COURT: Well, I don't think Bobgodfrey is a negligence case either.

MS. LAKE: Your Honor, Fishal versus Sympson isn't a negligence case. It is a breach of contract.

MR. SACHSEL: And what canon was allegedly violated?

THE COURT: This is truth and did not mislead or make false statements. Well, Bobgodfrey, the one that -- Mr. Sachsel, the one that I am relying on mostly is that false statements were allegedly made by attorneys, that they intentionally falsely alleged certain things about the case.

MR. SACHSEL: But that is an action by a non-client, Your Honor.

THE COURT: I think it wasn't. I think it was -- That may be right. Bobgodfrey does appear to be -- yes, you are right. This is a non-client.

MS. LAKE: I think it was the one, Brainard versus Brown, Your Honor, the one you had referred to earlier, a New York case.

THE COURT: Well, I don't know that I did refer to Brainard at all, but the logic, the language is the same. They don't really make the distinction at all between non-client and client as far as

the violation of the ethical considerations are concerned.

Well, we are where we are on this matter. I have made my ruling. You may step down, Mr. Dash, thank you.

MR. SACHSEL: May I ask Professor Dash one question before he steps down?

THE COURT: Certainly.

MR. SACHSEL: Your Honor, this is simply for the purpose of the record.

Professor Dash, in your opinion as a lawyer, not as an expert on the code of professional responsibility, was a fiduciary duty breached by Mr. Gill on the facts as you have heard them?

MS. LAKE: Do I object?

THE COURT: Yes.

MS. LAKE: Objection.

THE COURT: The objection is sustained. I have made my ruling and you have made your record and that goes. This isn't a change to supplement and get a lot of other things in. Thank you, sir. You may step down.

Now, where does that leave us today?

MS. LAKE: I don't know whether they have any more witnesses.

THE COURT: Do you have any more?

MR. SACHSEL: We have no more witnesses, Your Honor, based on that ruling.

THE COURT: I understand. Based on that ruling, are you prepared to rest at this point?

MR. SACHSEL: Yes.

THE COURT: All right.

MS. LAKE: And, Your Honor, we move for summary judgment, and the basis --

THE COURT: You don't have to argue again. All right, well, I am prepared to -- not summary judgment, but directed verdict, I assume.

MS. LAKE: Yes, motion for judgment.

THE COURT: Motion for judgment? All right. I am going to grant the plaintiff's motion for judgment in this case since I feel that there is a lack of expert testimony that is required. I will

call the jury in and explain to them very briefly what we have done here so that they don't --

MS. LAKE: Your Honor, did you say, "Plaintiff's?" I think you said, "Plaintiff's motion for judgment."

THE COURT: I meant defendant's motion for judgment is granted.

No Judgment separate from its
Order was entered by the
Court of Appeals of Maryland

M A R Y L A N D:

IN THE COURT OF APPEALS
OF MARYLAND

JAMES L. HOOPER	:	
	:	
Plaintiff,	:	Petition Docket
	:	No. 297
v.	:	
	:	September Term,
JOHN GILL, et al.	:	1989
	:	(No. 1311, Septem-
Defendant.	:	ber Term, 1989
	:	Court of Special
	:	Appeals)

O R D E R

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 10th day of January, 1990

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert C. Murphy
Chief Judge

Date: January 10, 1990

MANDATE

M A R Y L A N D:

IN THE COURT OF APPEALS
OF MARYLAND

JAMES L. HOOPER :
:
Plaintiff, : Petition Docket
: No. 297
v. :
: September Term,
JOHN GILL, et al. : 1989
: (No. 1311, Septem-
Defendant. : ber Term, 1989
: Court of Special
: Appeals)

JUDGMENT: June 1, 1989: Opinion by
Gilbert, C.J. Judgment
affirmed. Costs to be paid by
appellant.

July 3, 1989: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for MONTGOMERY
COUNTY 16791

Record.....	\$ 50.00
Stenographer Costs.....	904.40
Total	954.40*

In Court of Special Appeals:

Filing Record on Appeal..	\$ 50.00
Printing Brief for	
Appellant.....	73.80
Reply Brief.....	18.00
Portion of Record Ex-	
tract--Appellant.....	2,270.80
Total	\$2,412.60*
Printing Brief for Ap-	
pellee.....	81.00

Portion of Record Ex-	
tract--Appellee.....	223.00
Total	\$ 304.00*

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this third day of July A.D. 1989.

/s/ Ledie D. Gradet
Clerk of the Court of
Special Appeals

COSTS SHOWN ON THIS MANDATE ARE TO BE
SETTLED BETWEEN COUNSEL AND NOT THROUGH
THIS OFFICE.

M A R Y L A N D:

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY

JAMES L. HOOPER	:	Filed November
	:	20, 1989
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 16791
JOHN GILL,	:	
	:	
Defendant.	:	

FIRST AMENDED COMPLAINT
FOR BREACH OF FIDUCIARY
DUTY AND FOR VIOLATION
OF CIVIL RIGHTS

Plaintiff, by counsel, alleges:

Count I

(Breach of Contractual Fiduciary Duty)

1. Plaintiff is a resident and citizen of Montgomery County, Maryland.

2. Defendant is a resident and citizen of Montgomery County, Maryland, who is, and at all times hereto pertinent was, engaged in the practice of law in said State and County.

3. During 1980, defendant was employed by plaintiff to represent plaintiff in conjunction with a criminal

investigation and prosecution of plaintiff then being conducted by the Office of the Attorney General for the State of Maryland.

4. During the course of defendant's representation of plaintiff in conjunction with the matters set forth in paragraph 3 hereof, plaintiff and defendant became involved in a disagreement concerning the amount of fees defendant was charging plaintiff.

5. As a result of the disagreement referenced in paragraph 4 hereof, plaintiff discharged defendant as his counsel.

6. At or shortly after the time plaintiff discharged defendant as his counsel, defendant threatened plaintiff that unless plaintiff paid defendant the full amount of the fees defendant claimed to be owed, defendant would bring to the attention of the Maryland Attorney General certain matters which defendant learned in the course of his representation of

plaintiff in said investigation and prosecution, and which defendant believed to be incriminating with respect to the criminal matters being investigated and prosecuted by the Maryland Attorney General (referenced in paragraph 3 hereof).

7. Plaintiff did not pay defendant the amount he demanded and did not give in to the threat made by defendant.

8. After defendant was discharged by plaintiff as plaintiff's counsel in the matters referenced in paragraph 3 hereof, defendant did contact the Maryland Attorney General and did provide information he believed to be adverse to plaintiff (his former client), which information was obtained in the course of his representation of plaintiff, and which information related to the matter in which defendant had been representing plaintiff. This information first became known to plaintiff in late 1985 or early 1986, when documents were produced by the Attorney

General of Maryland in a civil case being litigated by plaintiff against, inter alia, the Attorney General for the State of Maryland. See, Exhibit A (attached hereto and made a part hereof).)

9. The actions of defendant, as set forth above, constituted a breach of fiduciary duty owed by defendant to plaintiff by virtue of the contractual relationship of attorney and client that existed between defendant and plaintiff and a breach of cannons of professional ethics and responsibility. Said breaches were willful and malicious.

10. By reason of the matters set forth above, the Attorney General of Maryland was caused and encouraged to continue the investigation and prosecution of plaintiff, and did in fact act on the information provided by defendant.

11. By reason of the matters set forth above, plaintiff incurred substantial additional legal and other expenses in the sum of approximately

\$20,000.00 and was forced to endure a criminal trial at which he was acquitted at the close of the State's case because the State failed to prove a prima facie case.

12. By reason of the matters set forth above, plaintiff suffered grievous emotional distress which caused him to obtain medical treatment and incur substantial expenses for the same for himself and his family in the sum of approximately \$15,000.

Count II

(Tortious Breach of Fiduciary Duty)

13. Plaintiff repeats and realleges each and every allegation of Count I hereof as if fully set forth.

14. By reason of the matters set forth above, defendant tortiously breached a fiduciary duty owed to plaintiff.

Count III

(Civil Rights Violation)

15. Plaintiff repeats and realleges

each and every allegation of Counts I and II hereof as if fully set forth.

16. Defendant knew, or had reason to know, that the Office of the Maryland Attorney General would act on the information provided to it by defendant.

17. The office of the Attorney General of Maryland did in fact act on the information concerning plaintiff provided to it by defendant.

18. By reason of the matters set forth above, defendant acted in concert with the Office of the Attorney General to deny plaintiff rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States of America and by the Constitution of the State of Maryland.

19. By reason of the matters set forth above, defendant violated 42 U.S.C. 1983 and the Constitution and laws of the State of Maryland designed and intended to protect plaintiff's civil rights.

WHEREFORE, plaintiff prays that he be awarded compensatory damages in the sum of \$585,000.00 (including \$500,000.00 for emotional distress), plus punitive damages in the sum of \$1,000,000.00, for defendant's willful and malicious conduct, together with all costs, expenses, and disbursements of this action, including reasonable attorneys' fees, and such other and further relief this Court deems just, equitable, and proper.

Plaintiff demands a trial by a jury of twelve on all issues herein.

Respectfully submitted,

/s/ Stephen A. Armstrong
STEPHEN A. ARMSTRONG
c/o MRI
7202 Arlington Boulevard
Falls Church, Virginia 22042
(703) 573-9358

/s/ Allen H. Sachsel
ALLEN H. SACHSEL
10560 Main Street, Suite 416
Fairfax, Virginia 22030
(703) 385-8788

/s/ John H. Conrad
JOHN H. CONRAD
966 Hungerford Drive
Rockville, Maryland 20850
(301) 340-6220

CERTIFICATE OF SERVICE

I certify that on August 28, 1986, I caused a copy of the foregoing First Amended Complaint to be mailed, first class, postage prepaid, to: John Gill, Esquire, 17 West Jefferson Street, Rockville, Maryland 20850.

/s/ John H. Conrad
JOHN H. CONRAD

IN THE COURT OF APPEALS
OF MARYLAND

JAMES L. HOOPER,	:	
	:	September Term,
Petitioner,	:	1989
	:	
v.	:	PETITION NO. 297
	:	
JOHN GILL, et al.,	:	Filed November
	:	20, 1989
Respondents.	:	

MOTION FOR RECONSIDERATION

On October 20, 1989, this Court denied petitioner's Petition for a Writ of Certiorari to review the judgment of the Court of Special Appeals affirming a judgment of the Circuit Court for Montgomery County. For the reasons stated below (including a denial of Due Process to petitioner), we respectfully request reconsideration of the Petition. 1/

1. As a preliminary matter, we note that the Court's conclusion that the public interest does not warrant consideration of this case is, to say the

1/ We do not by this motion abandon any contention set forth in our Petition.

least, puzzling. While we will not repeat the arguments advanced in our Petition, we think it worth again stating that the Court of Special Appeals (and by its denial of the Petition this court) has affirmed a ruling of the Circuit Court that deliberate and malicious disclosure by an attorney of confidential client information is not as a matter of law (1) a tortious breach of fiduciary duty and (2) a breach of the contract between attorney and client. Irrespective of whether or not such a willful and malicious act actually resulted in the damage intended, we would think the Court would wish to speak to the issue and not, by avoidance, simply leave such a ruling stand. To so speak is, we believe, the obligation of the Court to both the public and to the legal profession.

2. While we maintain our position that Dr. Hooper had damages from the breach -- that he did not get the preservation of confidence for which he

paid -- we direct the Court's attention to the refusal to decide the issues of whether there was a breach of contractual fiduciary duties and a tortious breach of those duties on the following ground (79 Md. App. at 445, 557 A.2d at 1353):

There is, of course, the claim to be made that, even though actual damages were not shown, the doctor is nevertheless entitled to nominal damages as a result of the breach of confidence. We turn that contention aside because the amount recoverable, if actionable, is absolutely de minimis in view of the costs in judicial time of retrial on the sole issue of nominal damages.

The Court of Special Appeals, in effect, has stated that any error by a Circuit Court where only nominal damages are at stake automatically will be ratified on review. By implication, it has sent word out that small cases, regardless of their importance to the

parties, simply are not worth the time of the judges and other court personnel the taxpayers (including the taxpayers involved in that particular small dispute) provide the funds to employ.

That the resolution of the legal issues, irrespective of whether damages are only nominal, is important to the parties is evident from the size of the record in this case. Not only is the issue important to the plaintiff. It clearly is important to defendants. Significantly, defendants refused to consent to entry of a judgment against them limited to nominal damages.

Not only are nominal damages and principle at stake. There also is the question of payment of costs. By refusing to resolve legal issues because of the "costs in judicial time", the Court of Special Appeals has decided that Dr. Hooper is to bear costs, regardless of the validity of his legal position.

As we demonstrated in our Petition, unchallenged by respondents, it plainly is the law in this State that proof of breach of contract and proof of certain tortious conduct entitle a plaintiff to nominal damages irrespective of proof of consequential damages. The Court of Special Appeals simply has determined that it will not apply settled law. If Dr. Hooper is entitled only to nominal damages, he wants them, and they should be awarded. On the other hand, if this Court determines that willful, deliberate, and malicious revelation by an attorney of client confidential information is not a breach of the attorney client contract and/or is not tortious, it should say so.

The Court of Special Appeals deemed its decision in this case worthy of publication. Since it resolved little or nothing of the legal issues, we can conclude only that publication was to send a message to the bar and the public that the appellate system can concern itself

only with large dollar cases. While the amount involved, or potentially involved, in a case may be a legitimate consideration in determining whether or not an appeal should be pursued (because of expense to the client), we believe it should not be a reason for an appellate court to refuse to decide a case once the matter is before it. If the litigants are willing to put forth the expense and effort, surely the reviewing court should do no less.

Not only is the Court of Special Appeals' refusal to decide the issues unjustified for the reason given. Even the reason given does not withstand scrutiny. The fact is that it took no more effort and space to avoid the issue than to decide it. If the court were to have decided, as we believe it should have, that the breach of confidence was breach of a legal duty as a matter of law, it simply could have remanded with directions to enter a judgment for nominal

damages. However, if it believed there were a triable issue, a remand probably would have involved only a day of the trial court's time -- hardly a disproportionate imposition. Though we disagree with the rulings of the trial court, we note that that court properly informed defendants, after ruling that only nominal damages could be recovered, that plaintiff was entitled to try his case for nominal damages if he so elected. See, Carey v. Piphus, 435 U.S. 247, 266 (1978).

3. It is fundamental that Due Process means free access to the courts. But, Due Process does not mean that once that access has been obtained, the Court will not give a full and attentive hearing to a case and will decline to decide the case simply because the amount involved is small or nominal. While, certainly, there may be jurisdictional monetary limits that may preclude appeal, once there is jurisdiction, as there is here, it is

reasonable to expect that the issues be resolved and not brushed aside as not being worth the court's time.

"[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982), citing Mullone v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Martinez v. California, 444 U.S. 277 (1980). "The hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" Logan, supra, 455 U.S. at 430. And, "the types of interests protected as 'property' are varied and, as often as not, intangible." Id. "What the Fourteenth Amendment does require ... 'is "an opportunity (emphasis by the Court) ... granted at a meaningful time and in a meaningful manner, (emphasis added) [citation omitted] "for [a] hearing appropriate to the nature of the case."' "Ibid., at 437.

Effective access to
the courts is a
constitutional right,
Bounds v. Smith,
430 U.S. 817, 97 S. Ct.
1491, 52 L. Ed. 2d
72 (1977), which
"encompasses all
means a defendant or
petitioner might
require to get a fair
hearing from the
judiciary on
all charges against
him or grievances al-
leged by him,
"Gilmore v. Lynch,
319 F. Supp. 105, 110,
(N.D. Cal. 1970), aff'd
sub nom. Younger
v. Gilmore, 404
U.S. 15, 92 S. Ct. 250,
30 L. Ed. 2d 142
(1971).

Hillard v. Scully, 537 F. Supp. 1084
(1982).

As stated above, the Court of Special Appeals has said it will not consider Dr. Hooper's claim because nominal damages simply are not worth the time. We respectfully suggest that such a value judgment is for the parties, not a court, to make. Parties are entitled to have their claims, large and small, adjudicated. It is but one step from the

Court of Special Appeals' reasoning to permitting courts arbitrarily to determine that compensatory damages must be of a certain amount before it is worth the judicial resources to resolve the issues. Questions of jurisdictional amounts properly are legislative, not judicial, functions.

In short, the Court of Special Appeals has denied Due Process in this case. That result has been sanctioned by this Court.2/

2/ "While the state is not required by the federal Constitution to provide the right of appellate review, when that right is given, a person is protected from invidious discrimination with respect thereto, or from improper denial thereof by the due process guarantee." 5A MLE "Constitutional Law", sec. 426 at 80-81, citing In re Trader, 20 Md. App. 1 (1974), reversed on other grounds, 272 Md. 364 (1974).

4. For the foregoing reasons, the denial of the Petition should be reconsidered, and certiorari should be granted.^{3/}

Respectfully submitted,

ALLEN H. SACHSEL

PAUL WIESENFELD
932 Hungerford Drive,
Suite 20
Rockville, Maryland
20850
(301) 765-5529

^{3/} Several other observations are in order:

1. Respondents consistently have represented in this case and in their Answer to the Petition that there was a question of perjured testimony so far as Gill was concerned. There is nothing in the record to support respondents' statements. Such statements are false, and they know it.

2. Cases cited by respondents at pp. 7-8 of their answer do not support a conclusion that remand should be denied when only nominal damages are involved.

3. Respondents' ad hominem attack on petitioner (Answer at 12) is improper, irrelevant, and untrue. Moreover, each case is to be decided on its particular merits.

No. 89-1577

Supreme Court, U.S.

FILED

MAY 8 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JAMES L. HOOPER,
Petitioner,

v.

JOHN GILL, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF FOR RESPONDENTS IN OPPOSITION

ALVIN I. FREDERICK *
SHIRLIE NORRIS LAKE
JOHN S. VANDER WOUDE
ECCLESTON AND WOLF
7th Floor—Scarlett Place
729 East Pratt Street
Baltimore, Maryland 21202
(301) 752-7474
* Counsel of Record



QUESTIONS PRESENTED

- I. Whether the Maryland Court of Special Appeals' refusal to remand the Petitioner's case for a new trial solely on the issue of nominal damages warrants review by the Supreme Court on Writ of Certiorari?
- II. Whether the Maryland trial and appellate courts' application of Maryland law on legal malpractice/breach of fiduciary duty to this case warrants review by the Supreme Court on Writ of Certiorari?
- III. Whether the Maryland courts' granting of summary judgment in favor of Respondents on Petitioner's claim of violation of 42 U.S.C. § 1983 warrants review by the Supreme Court?

PARTIES TO THE PROCEEDING

A list of the parties to the proceeding has been omitted pursuant to Rule 34.2 of the Supreme Court Rules.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1577

JAMES L. HOOPER,

Petitioner,

v.

JOHN GILL, JR., *et al.*,

Respondents.

**On Petition for a Writ of Certiorari to the
Court of Appeals of Maryland**

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Citations to the opinions delivered in the Courts below have been omitted pursuant to Rule 34.2 of the Supreme Court Rules.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction over Questions 1 and 2 set forth in Petitioner's Petition for Writ of Certiorari. Specifically, Question No. 1 concerns the Maryland Court of Special Appeals' refusal to remand Petitioner's legal malpractice case to the trial court for a second trial on

nominal damages. That issues does not involve any federal question and is based purely on Maryland law. As a result, this is not a proper subject for review by the Supreme Court on Writ of Certiorari under 28 U.S.C. § 1257. See, *Wetzel v. Ohio*, 371 U.S. 62, 83 S. Ct. 111 (1962).

Question No. 2 in the Petition also involves purely Maryland law and is not the proper subject for review by the Supreme Court. That Question concerns the alleged failure by the Maryland courts to apply their own decisions concerning legal malpractice/breach of fiduciary duty to the Plaintiff's case. Moreover, the Petitioner never raised the purported "constitutional" violations set forth in Petitioner's Question No. 2 in his Petition for Writ of Certiorari to Maryland's highest court, the Maryland Court of Appeals. As a result, the Supreme Court does not have jurisdiction to review this issue under 28 U.S.C. § 1257. *Webb v. Webb*, 451 U.S. 493, 494-496, 101 S. Ct. 1889 (1981).

The Supreme Court has jurisdiction over the Petitioner's 42 U.S.C. § 1983 claim pursuant to 28 U.S.C. § 1257 and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The only constitutional or statutory provision which is actually involved in this proceeding is 42 U.S.C. § 1983. The text of that statute is set forth in Petitioner's Petition and has been omitted here pursuant to Rule 34.2 of the Supreme Court Rules.

STATEMENT OF THE CASE

In the proceedings below, the Circuit Court for Montgomery County, Maryland (Peter J. Messitte, Judge) entered final judgment in favor of the Respondents, John G. Gill, Jr., Esquire, Thomas J. Sippel, Esquire, and the law firm of Gill and Sippel, at the end of the Petitioner's

case in a trial of a claim alleging legal malpractice. The Court of Special Appeals of Maryland affirmed that judgment on appeal. The Court of Appeals of Maryland denied the Petitioner's Petition for Writ of Certiorari. The Court of Appeals of Maryland further denied the Petitioner's Motion for Reconsideration.

The Petitioner, Dr. James L. Hooper, filed his original Complaint in the Circuit Court on or about August 5, 1986. After numerous amendments adding new Counts and new parties, Dr. Hooper filed his Third Amended Complaint on December 1, 1986. The Third Amended Complaint alleged breach of fiduciary duty (Count I), tortious breach of fiduciary duty (Count II), and a civil rights violation under 42 U.S.C. § 1983 (Count III) for John Gill's disclosure of possibly perjured testimony of a witness to the prosecutor in a criminal Medicaid fraud case in which Gill represented Dr. Hooper. The Third Amended Complaint also alleged fraud (Count IV) against the Respondents in obtaining Dr. Hooper's signature on a release in connection with the settlement of a fee suit the law firm of Gill and Sippel had prosecuted against Dr. Hooper. Count IV asked that the release be set aside and the \$4,400.00 settlement payment returned.

At a hearing on August 26, 1987, Judge Messitte granted in part and denied in part the Respondents' Motion for Summary Judgment as to Count I (breach of contractual fiduciary duty) and Count II (tortious breach of fiduciary duty). Specifically, the Motion was denied as to liability on Counts I and II, but the Court ruled that in the event Dr. Hooper were able to establish liability on either Count I or II, he had suffered no compensatory damages and, therefore, his damages would be limited to \$1.00 in nominal damages for a technical violation of his rights. The Court dismissed with prejudice Dr. Hooper's claims for punitive damages in Counts I and II. The Court granted Respondents' Motion for Summary Judgments as to Count III (civil rights viola-

tion) because discovery had disclosed no evidence of any state action necessary to support the § 1983 claim.

On or about December 30, 1987, Dr. Hooper filed yet another amendment to the Third Amended Complaint (his fourth), adding Count V, entitled "Equitable Relief from Judgment." This Count requested that the Court vacate and reopen the Circuit Court's 1982 judgment in the fee suit (*Gill and Sippel v. Hooper*) on the grounds of Gill's alleged breach of fiduciary duty and requested a return of the attorney's fees awarded to the law firm of Gill and Sippel in that fee suit. At that same time, the Petitioner filed a separate "Petition for Writ of Error Coram Nobis/Motion to Reopen Judgment" in the fee suit of *Gill and Sippel v. Hooper*, Law No. 58524, on the same grounds as alleged in Count V. The Circuit Court granted the Respondents' Motion to Strike Count V because it requested the same relief as Counts I and II. In that same hearing, Judge Messitte denied the Petition for Writ of Error Coram Nobis in Law No. 58524, noting that it was identical to Count V and that it also requested the same relief as was already requested in Counts I and II of the Petitioner's Third Amended Complaint. Dr. Hooper subsequently appealed the Court's denial of the Petition for Writ of Error Coram Nobis to the Court of Special Appeals of Maryland, and the Court of Special Appeals affirmed that ruling on December 8, 1988.

The Respondents next filed and the Circuit Court granted a Motion for Partial Summary Judgment on Count IV (fraud) on the grounds that Gill's alleged breach of fiduciary duty would not have been a defense available to Dr. Hooper in the fee suit. Respondents subsequently filed a Motion for Summary Judgment on Count IV on the grounds that Dr. Hooper would not have prevailed on an appeal of the fee suit to the Court of Special Appeals even if he had not signed the allegedly fraudulent release and had prosecuted the fee suit through the appeal. The Circuit Court granted Re-

spondents' Motion for Summary Judgment on Count IV in a hearing on August 8, 1988.

As a result of the pre-trial rulings, this legal malpractice case went to trial on September 1, 1988 solely on Count I (breach of contractual fiduciary duty) and Count II (tortious breach of fiduciary duty). The only expert witness identified in discovery and called by the Petitioner at trial was Professor Abraham Dash of the University of Maryland Law School. In his deposition and at trial, Professor Dash testified that he was only qualified as an expert on the Code of Professional Responsibility and could not testify as an expert on the issue of whether Respondents' actions in this case constituted a breach of the civil standard of care for an attorney. After hearing Professor Dash's proffered testimony at trial, Judge Messitte granted Respondents' Motion in Limine to exclude Professor Dash's testimony.

At the conclusion of the Petitioner's/Plaintiff's case at trial, Respondents moved for judgment pursuant to Maryland Rule 2-519 on the grounds that the Petitioner/Plaintiff had failed to prove a breach of the standard of care by the Respondents/Defendants through expert testimony, as required by Maryland law. After oral argument on the Motion and review of all of the cases cited, Judge Messitte granted the Respondents' Motion for Judgment.

The Petitioner subsequently appealed the various pre-trial and trial rulings of the Circuit Court for Montgomery County to the Court of Special Appeals. In a published opinion, *Hooper v. Gill*, 79 Md. App. 437 (1989) issued on June 1, 1989, the Court of Appeals affirmed the judgment of the Circuit Court. The Court of Special Appeals recognized that the Petitioner's "allegations involving tortious and contractual breach of fiduciary duty focus on alleged legal malpractice." (A. 4). The Court further recognized that "[e]xpert testimony is necessary in a legal malpractice case to establish the existence of a

breach of a reasonable legal duty, except in that class of cases 'where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence from the facts.'" (A. 5).

However, the Court of Special Appeals found it unnecessary to decide the issue of whether Professor Dash's excluded testimony regarding the alleged violation of the Code of Professional Responsibility was sufficient to establish a breach of the civil standard of care because it recognized that "Dr. Hooper failed to prove any damages." (A. 8). The Court recognized that damage is an essential element of a cause of action against an attorney for breach of duty, (A. 4-5), and that "[s]ince there were no damages, there can be no recovery." (A. 8). The Court rejected the Petitioner's claim that he was entitled to nominal damages as a result of the alleged breach, noting that such damages, even if actionable, were "absolutely *de minimis* in view of the costs in judicial time of retrial on the sole issue of nominal damages." (A. 9).

The Appellate Court further held that since no compensatory damages were suffered by Dr. Hooper, his claim for fraud (Count IV) was properly dismissed by the Circuit Court. (A. 10). The Appellate Court also affirmed the trial court's ruling that Dr. Hooper was not entitled to the return of any attorney's fees paid to Gill since the alleged fraud of Gill occurred after Hooper had discharged Gill, and Gill was entitled to compensation for the legal services performed prior to the alleged fraud. (A. 10). Finally, the Court of Special Appeals affirmed the dismissal of the Petitioner's claim against the Respondents under 42 U.S.C. § 1983, since Gill was a private attorney and there was no evidence that Gill acted "under color of state law." (A. 10-11).

Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland. That Petition was denied. Petitioner then filed a Motion for Reconsideration with the Court of Appeals which was also denied.

SUMMARY OF ARGUMENT

Petitioner's Petition for Writ of Certiorari raises no special or important issues warranting review by the Supreme Court. Questions Nos. 1 and 2 set forth in the Petition involve purely questions of Maryland state law and do not involve any federal questions. Question No. 2 was also not raised in Petitioner's Petition for Writ of Certiorari to Maryland's highest court, the Maryland Court of Appeals, and is not properly before this Court. 28 U.S.C. § 1257.

Additionally, the Maryland Court of Special Appeals' refusal to remand the Plaintiff's legal malpractice case for a second trial solely on the issue of nominal damages was proper and did not violate due process.

The Maryland courts also properly applied Maryland law on the issue of legal malpractice breach of fiduciary duty in this case.

The Maryland courts' granting of summary judgment in favor of Respondents on Petitioner's claim for violation of 42 U.S.C. § 1983 does not warrant review by the Supreme Court as it does not conflict with any decision of any other federal or state court, and it does not concern a federal question which has not been settled by the Supreme Court. The Maryland courts' ruling that there was no concerted action between the Respondents, who are private attorneys, and a state official necessary to constitute action "under color of state law" for purposes of 42 U.S.C. § 1983 was also proper. Accordingly, this Court should deny the Petitioner's Writ of Certiorari.

ARGUMENT

I. THE MARYLAND COURT OF SPECIAL APPEALS' REFUSAL TO REMAND THE PETITIONER'S CASE FOR A SECOND TRIAL ON NOMINAL DAMAGES DOES NOT INVOLVE ANY SPECIAL OR IMPORTANT ISSUES WARRANTING REVIEW BY THE SUPREME COURT.

The first Question raised in the Petition for Writ of Certiorari claims that the Court of Special Appeals of Maryland denied the Petitioner constitutional due process when it refused to remand the case to the trial court for a second trial solely on the issue of nominal damages. The Petitioner contends that the Court of Special Appeals had no authority to exercise discretion and refuse to remand the case for a new trial. This contention raises no special or important issues warranting review by the Supreme Court.

First, the Petitioner's contention that he was denied due process by the Appellate Court's refusal to remand for a new trial on nominal damages is simply not true. The Petition admits that the Petitioner had full due process on that claim in the original trial. The Petition acknowledges that the Petitioner's claim for nominal damages did go to trial in the Circuit Court for Montgomery County, Maryland. After the Petitioner presented his entire case, including the claim for nominal damages, the trial court granted the Respondents' Motion for Judgment because the Petitioner had failed to prove his case through the required expert testimony. The Court of Special Appeals of Maryland affirmed that judgment on different grounds. Specifically, the Court of Special Appeals recognized that damage was a necessary element of proof on the Petitioner's claim for legal malpractice, and that the Petitioner had failed to prove any damages at trial. (A. 8-9). The Court of Appeals of Maryland affirmed that decision when it refused to grant the Petitioner's Petition for Writ of Certiorari.

Due process only requires notice and the opportunity to be heard at a meaningful time and in a meaningful

manner. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 108 S. Ct. 1740, 1747 (1987); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 1494 (1985). The Petitioner received full due process in litigating his claims against the Respondents in the trial in the Circuit Court for Montgomery County, Maryland. The Maryland Appellate Courts gave the Petitioner additional due process on those claims in reviewing his appeals and in affirming the trial court's decision. The Appellate Court's refusal to remand the case for a *second* trial solely on the issue of nominal damages did not deny the Claimant any right of due process. Due process does not require that an individual be afforded *two* trials on the same issue.

Second, this issue solely involves Maryland law and does not raise any federal questions warranting review by the Supreme Court. The issue of whether a party is entitled to compensatory and or nominal damages in a legal malpractice case in Maryland is strictly an issue of Maryland state law. The Court of Special Appeals was correct in recognizing that in Maryland *compensatory* damages are a necessary element of a cause of action for legal malpractice. (A. 4-5, 8-9). See, *Flaherty v. Weinberg*, 303 Md. 116, 128, 492 A. 2d 618 (1985). As a result, this issue is not a proper subject for review by the Supreme Court on Writ of Certiorari under 28 U.S.C. § 1257. See, *Wetzel v. Ohio*, 371 U.S. 62, 83 S. Ct. 111 (1962).¹

Third, the Petitioner's contention that the Maryland Court of Special Appeals did not have the discretion to refuse to remand the case for a second trial on the issue

¹ Petitioner's assertion that this legal malpractice claim involves an "intentional tort" entitling him to presumed damages is frivolous. Maryland recognizes only a limited number of intentional torts, such as *per se* defamation and trespass to land, for which damages may be presumed. Legal malpractice is not such a tort. See, *Flaherty v. Weinberg, supra*; *Glasgow v. Hall*, 24 Md. App. 525, 529-539 (1975).

of nominal damages is a mis-statement of Maryland law. In Maryland, the Appellate Courts will not reverse and remand an error by a trial court "unless that error is 'both manifestly wrong and substantially injurious'". *I.W. Berman Properties v. Porter Bros., Inc.*, 276 Md. 1, 11-12 (1975); *Rotwein v. Bogart*, 227 Md. 434, 437 (1962). Thus, under established Maryland law, the Court of Special Appeals properly refused to remand the case for a new trial solely on the issue of nominal damages.

The federal courts have a similar provision found in 28 U.S.C. § 2111, which provides:

Harmless Error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Thus, the federal appellate courts also have the discretion to refuse to remand a case on appeal for a new trial if the only errors or defects do not affect the substantial rights of the parties. Clearly, the Petitioner's claim for nominal damages of \$1.00 is not a "substantial right" warranting remand for a second trial on the same matter.

Finally, the Petitioner's claim that the Court of Special Appeals should have remanded the case to the trial court for a new trial solely on the issue of nominal damages does not involve any of the "special and important reasons" for review by the Supreme Court which are set forth in Rule 17 of the Supreme Court Rules. It does not concern conflicting decisions of two federal appellate courts, it does not concern a state court decision which is in any way in conflict with decisions of other courts on a federal question and it does not concern an important question of federal law which has not been settled or decided by the Supreme Court. As a result, this issue does not warrant review by the Supreme Court.

II. THE PETITIONER'S ARGUMENT THAT THE MARYLAND COURTS VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHEN THEY ALLEGEDLY "FAILED AND REFUSED TO APPLY THEIR OWN DECISIONS TO THIS PARTICULAR CASE" DOES NOT WARRANT REVIEW BY THE SUPREME COURT.

The Petitioner's Question No. 2 contends that the Maryland courts "failed and refused to apply their own decisions to this particular case." The Petitioner contends that through this alleged failure to apply their decisions, the Maryland courts "have endorsed policies that are at odds with the Fifth, Sixth and Fourteenth Amendment guarantees, and have created unique procedural and evidentiary requirements for this particular case, thereby denying both due process and equal protection." Petition at Pages 10-11. This argument clearly involves no federal question warranting review by the Supreme Court.

Even if the Petitioner is correct in his argument that the Maryland courts somehow failed to follow or apply their own decisions concerning the Respondents' alleged breach of fiduciary duty/legal malpractice in this case, that issue is not the proper basis for a Petition for Writ of Certiorari to the Supreme Court. Maryland state court decisions concerning Maryland law on legal malpractice and breach of fiduciary duty do not concern any federal questions and are not the proper subject of review by the Supreme Court. 28 U.S.C. § 1257.

Moreover, a review of the decision by the Court of Special Appeals and the cases it cites (A. 2-11) demonstrates that the Court of Special Appeals *did* properly apply Maryland law on legal malpractice in ruling upon the Petitioner's issues raised on appeal. Petitioner's assertions as to Maryland law on legal malpractice are simply wrong, and every Maryland court which has considered the Petitioner's arguments has ruled against him based on established Maryland law.

Additionally, the Petitioner never raised this purported constitutional issue in the Court of Special Appeals nor in the Court of Appeals of Maryland. As a result, it is not properly raised for the first time in the Supreme Court. 28 U.S.C. § 1257; *Webb v. Webb*, 451 U.S. 493, 494-496, 101 S. Ct. 1889 (1981).

The Petitioner's claim that the Maryland courts improperly applied Maryland law to his claim for legal malpractice does not raise any special or important issues warranting review by the Supreme Court under Rule 17. This issue does not concern conflicting decisions by two Federal Court of Appeals, it does not concern a state court decision on a federal question which conflicts with the decision of another court and it does not involve an important question of federal law which has not been decided or settled by the Supreme Court. As a result, there is no basis for review by the Supreme Court on this issue.

III. THE MARYLAND COURTS' GRANTING OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON PETITIONER'S CLAIM OF VIOLATION OF 42 U.S.C. § 1983 DOES NOT WARRANT REVIEW BY THE SUPREME COURT.

The Petitioner contends in Question No. 3 that the trial court erroneously granted Respondents' Motion for Summary Judgment on his claim under 42 U.S.C. § 1983, and that the Court of Special Appeals' ruling which affirmed that decision was also erroneous.

The Petitioner alleged in his Complaint that there was a violation of 42 U.S.C. § 1983 due to an alleged conspiracy between the state prosecutor and Respondent John Gill through which Respondent Gill would furnish information to the prosecutor relevant to the Petitioner's criminal case. The undisputed facts obtained in discovery and submitted in support of the Respondents' Motion for Summary Judgment demonstrated that no conspiracy existed.

The trial court granted the Respondents' Motion for Summary Judgment on the § 1983 claim because there were no facts establishing any concerted action between Respondent Gill, a private attorney, and any state official. Proof of such concerted action was necessary to meet the "color of state law" requirements of § 1983. The Court of Special Appeals of Maryland affirmed that decision since there were no facts demonstrating any concerted action "under color of state law." (A. 10-11).

This ruling does not concern any special or important issues warranting review by the Supreme Court. There are numerous decisions from the Supreme Court as well as other federal and state appellate courts setting forth the necessary elements to prove a civil cause of action under 42 U.S.C. § 1983. There are also numerous appellate decisions defining and analyzing concerted action between a private party and a government official necessary to bring the action of the private party "under color of state law" for purposes of 42 U.S.C. § 1983.

The rulings of the trial court and of the Court of Special Appeals of Maryland in which they found that there was no concerted action does not conflict with the decision of any other federal or state court. Rather, these decisions were in accordance with the rulings of other courts on the issue. *See, Benavidez v. Gurnell*, 722 F.2d 615, 618 (10th Cir. 1983); *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323, 327 (7th Cir. 1978); *Von Lusch v. C & P Telephone Co.*, 457 F. Supp. 814, 819 (D. Md. 1978). Moreover, this issue does not concern a question of federal law which has not been settled by the Supreme Court. The federal law concerning 42 U.S.C. § 1983 is well established. As a result, the Supreme Court should deny the Petitioner's Petition for Writ of Certiorari on this issue.

CONCLUSION

The Petitioner has demonstrated that he is a litigious individual who is unhappy with the fact that he was criminally prosecuted for medicaid fraud. He first sued

Dale Kelberman, the Assistant Attorney General who prosecuted the case, Steven Sachs, the Attorney General of Maryland, and others for alleged violations of his civil rights in that criminal prosecution. *See, Hooper v. Sachs*, 618 F. Supp. 963 (D. Md. 1985). The Defendants in that case filed a Motion for Summary Judgment which was granted. Dr. Hooper appealed that decision, and the Fourth Circuit Court of Appeals affirmed the summary judgment in an unpublished opinion. *See, Hooper v. Sachs*, 823 F.2d 547 (4th Cir. 1987). Dr. Hooper then filed a Petition for Writ of Certiorari to the Supreme Court which was denied. *See, Hooper v. Sachs*, 484 U.S. 954, 108 S. Ct. 347 (1987).

Dr. Hooper then filed this case against his former attorneys. Judgment was entered in favor of the Respondents by the Circuit Court for Montgomery County, Maryland and was affirmed in two separate opinions by the Court of Special Appeals. Dr. Hooper subsequently filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland which was also denied.¹ He requested reconsideration, and that request was denied. There are no matters left which warrant review by the Supreme Court, and it is time for an end to this litigation.

For the reasons set forth above, Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

ALVIN I. FREDERICK *
SHIRLIE NORRIS LAKE
JOHN S. VANDER WOUDE
ECCLESTON AND WOLF
7th Floor—Scarlett Place
729 East Pratt Street
Baltimore, Maryland 21202
(301) 752-7474

* Counsel of Record



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On Petition for a Writ of Certiorari to the
Court of Special Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

Wilbur H. Friedman, Jr.
(Counsel of Record)
1717 Pennsylvania Avenue
Room 863
Washington, D.C. 20570
(202) 254-9329

Paul R. Wiesenfeld
932 Hungerford Drive
Suite 20
Rockville, Maryland 20850
(301) 762-5525

Allen H. Sachsels
3251 Old Lee Highway
Suite 516
Fairfax, Virginia 22030
(703) 691-0130

Stephen A. Armstrong
10335 Democracy Lane
Fairfax, Virginia 22030
(703) 241-2855



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Court of Special Appeals of Maryland***

REPLY TO BRIEF IN OPPOSITION

1. Respondents contend petitioner was not denied Due Process (Op. at 8-9), arguing that “[t]he issue of whether a party is entitled to compensatory and/or nominal damages... is strictly an issue of Maryland state law” (Op. at 9). Whether nominal damages are recognized for particular conduct may be a question of state law. However, once that entitlement is established by state law, as it is in Maryland for breach of contract and deliberate torts (*see*, Pet. at 8-10), the courts of the state cannot arbitrarily permit the award in some such cases and not in others. It is the arbitrary and capricious denial of the right that

* Our Petition and the Brief in Opposition incorrectly indicate the Petition is for a writ of certiorari to the Court of Appeals of Maryland. That court denied discretionary review of the decision of the Court of Special Appeals of Maryland. Accordingly, the Petition properly should seek review of the judgment of the Court of Special Appeals. *See*, Rule 13.1, Rules of the Supreme Court of the United States. (All Rule citations hereafter are to the Rules of this Court.)

is the gravamen of petitioner's Constitutional contentions with respect to Question One.¹

With respect to respondents' contention that nominal damages (including significant costs)² do not involve "substantial rights" (Op. at 10), we note that the argument ignores, without comment, *inter alia*, this Court's decision in *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (*see*, Pet. at 10). The rights involved, as stated by this Court, are substantial. Accordingly, the error is not "harmless", as respondents contend.³

2. Throughout this litigation, petitioner asserted his Fifth, Sixth, and Fourteenth Amendment rights were violated. That assertion was made as part of his 42 U.S.C. 1983 claim which first was raised less than a month after this action was instituted. The claim has been maintained continuously. *See*, Op. at 2, 12-13; Pet. at 6-7, 13-14, A. 10-11, 60-61. Furthermore, petitioner contended from the outset that Gill's conduct was violative of the most basic concepts of the adversary system.

Our argument that the decision below is contrary to the policies underlying the cited Constitutional provisions effectively was raised.

¹ Petitioner does not contend Due Process requires two trials. He contends that based on the admitted facts he clearly was entitled under Maryland law to judgment as a matter of law, or to a remand. The Court of Special Appeals arbitrarily denied petitioner those rights for reasons that are unsupportable in law. *See*, Pet. at 10. Neither *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), nor *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (Op. at 9), supports respondents' contention that petitioner was accorded Due Process by the Maryland Appellate Courts with respect to the nominal damages issue. Those cases focus solely on what Due Process requires for a grant of temporary relief. We are at a loss to understand why respondents cite them.

² *Wetzel v. Ohio*, 371 U.S. 62 (1962), cited by respondents (Op. at 2, 9), is irrelevant. This is not a case where the sole remaining issue is costs.

³ Respondents misstate Maryland law. Irrespective whether this action can be classified as one for "legal malpractice", it is not an action grounded in negligence. Damages are a necessary element of a negligence claim. *See, Flaherty v. Weinberg*, 303 Md. 116, 128 (1985); *Glasgow v. Hall*, 24 Md. App. 525, 529 (1975), cited by respondents (Op. at 9). Damages are not an element of a cause of action for breach of contract, or this deliberate tort. *See*, Pet. at 7, 13; Mallen and Smith, *Legal Malpractice* (3rd ed. 1989), sec. 11.4 at 641, sec. 11.5 at 642-645.

In order to find a violation of 42 U.S.C. 1983, resolution of substantially the same questions is involved. *Cf. Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980); *Cuyler v. Sullivan*, 446 U.S. 335, 342-343 n.6 (1980). *And see, Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). Respondents' contention (Op. at 12) that our argument "is not properly raised" simply is incorrect.

3. Respondents also misstate our claim with respect to 42 U.S.C. 1983. Cases they cite (Op. at 13) holding that merely reporting to state agents does not make one a state actor have no applicability. What is alleged here, with evidence to support it, is that there was an agreement between Dale Kelberman, the prosecutor, and John Gill that Gill would convey, and Kelberman would accept from Gill, information Gill obtained during his representation of Dr. Hooper. When Kelberman agreed to accept the information, he knew Gill represented Dr. Hooper. For reasons stated in our petition, Fifth, Sixth, and Fourteenth Amendment rights were implicated and violated. This was not a conversation between the prosecutor and any private citizen. It was a conversation by the prosecutor with criminal defense counsel in which the evidence permissibly supports a conclusion that an agreement was made to convey and accept information obtained by Gill in the course of his representation of Dr. Hooper.

4. Contrary to respondents' contentions (Op. at 10, 12, 13), there are ample reasons to grant certiorari.⁴ The petition plainly shows that the Maryland Courts have ruled in manners that conflict with decisions of this Court and United States Courts of Appeals on matters that either directly involve or implicate federal interests. *See*, Rule 10.1 (a) and (b). Moreover, Rule 10.1 states that the criteria for certiorari review there set forth are "neither controlling nor fully measuring the Court's discretion." There are numerous reasons for granting the writ. *See*, Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th ed. 1986), sec. 4.17 at 222-223, sec. 4.26 at 238, paragraphs (h) and (k).

Totally apart from the fact that the Maryland Courts have misapplied federal law in their requirements for the quantum of evidence

⁴ Respondents cite Rule 17 in their argument. We assume they are referring to the predecessor of Rule 10 of the Rules adopted December 5, 1989, and effective January 1, 1990.

needed for a jury to decide whether there was the necessary agreement to trigger 42 U.S.C. 1983 liability, Gill's admitted conduct is so outrageously violative of basic concepts of the adversary system and Constitutional principles that review by this Court is warranted. The Maryland Courts have failed utterly in their responsibilities in the resolution of this case, and have further violated petitioner's Constitutional rights in the process.⁵

5 . For the foregoing reasons, and for the reasons stated in our petition, certiorari should be granted.

Respectfully submitted,

Wilbur H. Friedman, Jr.
(Counsel of Record)
1717 Pennsylvania Avenue
Room 863
Washington, D.C. 20570
(202) 254-9329

Paul R. Wiesenfeld
932 Hungerford Drive
Suite 20
Rockville, Maryland 20850
(301) 762-5525

Allen H. Sachsels
3251 Old Lee Highway
Suite 516
Fairfax, Virginia 22030
(703) 691-0130

Stephen A. Armstrong
10335 Democracy Lane
Fairfax, Virginia 22030
(703) 241-2855

⁵ The lack of merit in respondents' opposition is underscored by their irrelevant and inaccurate *ad hominem* attack on petitioner (Op . at 13-14) .

